(22,028.)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1909.**

## No. 802.

AMORY ELIOT, APPELLANT,

*vs.*

JAMES G. FREEMAN, ROBERT A. BOIT, NATHANIEL THAYER, AND ROBERT H. GARDINER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 17, 1910.

1 *Transcript of Record of Circuit Court.*

UNITED STATES OF AMERICA,
*District of Massachusetts, ss:*

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on the Third Tuesday of October, being the nineteenth day of October, in the year of our Lord one thousand nine hundred and nine.

Before the Honorable Francis C. Lowell, Circuit Judge.

No. 686, Equity Docket.

AMORY ELIOT, Complainant,
v.
JAMES G. FREEMAN et al., Defendants.

The Bill of Complaint in this cause was filed in the clerk's office on the fourteenth day of February, A. D. 1910, and is duly entered at the present October Term of this Court, and is in the words and figures following:

2 *Bill of Complaint.*

(Filed Feb. 14, 1910.)

To the Honorable the Judges of the Circuit Court of the United States for the District of Massachusetts:

Amory Eliot, of Manchester, in the Commonwealth and District of Massachusetts, brings this his bill of complaint in behalf of himself and of all other *cestuis qui trustent* of the trust property hereinafter described who are similarly situated and who shall be entitled to avail themselves of the benefit of this suit, against James G. Freeman, of Weston, formerly of Boston; Robert A. Boit, of Brookline; Nathaniel Thayer, of Lancaster, all in the Commonwealth and District of Massachusetts; and Robert H. Gardiner, of Gardiner, in the State and District of Maine.

And thereupon your orator complains and says as follows:

1. Your orator is one of the *cestuis qui trustent* of the property held in trust under an agreement and declaration of trust made on the second day of March A. D. 1903 by and between James G. Freeman and others as Trustees and the shareholders therein described, a copy of which is hereto annexed marked "A." Your orator is an owner of one hundred shares or portions of the beneficial interest therein, and has held them a long time and has owned them since a time long prior to the passage of the law hereinafter described.

2. The respondents hold in trust as aforesaid for the benefit
3 of your orator and other shareholders the two parcels of real estate described in said agreement and declaration of trust and the said property is collectively known as the property of the Cushing Real Estate Trust.

These terms of trust include powers of management and other like powers and farther provide for the issue of shares, corresponding to the proportionate undivided interest in the real estate conveyed to the trustees by the respective owners at the beginning of the trust, and for the division among the beneficiaries or shareholders of the net income over and above sinking or contingent fund therein provided for, by dividends.

3. Prior to March 2d, 1903, the said two parcels of real estate were owned by various persons holding various fractional undivided interests, and for many years prior to that time said property had been managed for said persons by an agent or attorney, but this method of management being inconvenient and complicated, especially in case of the death of an owner of any fractional interest, all the owners on said March 2d, 1903, conveyed said property in trust, as aforesaid, thus vesting the legal title in the respondent-trustees with powers of management, etc., as specified in said trust instrument and retaining the equitable title in themselves in proportion to their respective undivided interests so conveyed. Said respondent-trustees have since continued to manage said property for the benefit of said shareholders.

4. In 1907 said trust instrument was amended by all the shareholders to give the trustees thereunder the power to mortgage the trust property by an instrument, copy of which is hereto annexed marked "B," duly signed, acknowledged and recorded. Thereafter said respondents raised money by mortgage and constructed a new building on the first of said parcels above referred to. Said building when erected was leased, and is still leased, by said respondent-trustees to one tenant, and the entire income of said respondent-trustees from said parcel is the rental under said lease. The other parcel above described is occupied by an office building containing about twenty (20) offices, all of which are leased by the trustees to different tenants. Each tenant has a lease either at will or for a
4 term, and the entire gross income of the respondents from said building arises from the land itself. As an inducement to the tenants to take such leases the respondent-trustees procure from outside, heat, and the power wherewith to run an elevator, and supply said tenants in said office building with heat and elevator and janitor service. The entire gross and net income of said respondent-trustees from any source consists of the rentals from said two parcels, as aforesaid, and interest on bank deposits of said rentals from time to time.

5. The annual net income of the property held in trust as aforesaid for the calendar year 1909 ending December 31st last past, computed in the manner described in Section thirty-eight of a law of the United States entitled "An act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for

other purposes," approved August 5th, 1909, exceeds the sum of five thousand dollars.

6. Said Section thirty-eight of said law so far as the same is constitutional and valid requires or purports to require of each and every corporation, joint stock company or association organized for profit and having a capital stock represented by shares — now or hereafter organized under the laws of the United States or of any State or Territory, and engaged in business within the United States during the calendar year 1909, ending December 31st last past; that it shall (A) make a true and accurate return on or before the first day of March, 1910, containing divers matters and statements the particulars of which are in said law set forth and to said law your orator claims leave to refer for a statement thereof without cumbering the record herein by repetition thereof, and (B) on or before the thirtieth day of June, 1910, pay a tax to the Commissioner of Internal Revenue of one per cent of its net income so determined, and (C) shall suffer and permit its books and papers to be examined, its officers to attend and testify—and requires that such officers should so attend and testify—and shall produce its books and papers all as is in said law more particularly described as aforesaid.

7. The said respondent-trustees and the said shareholders and the said property known as the Cushing Real Estate Trust are not a "joint stock" or other association, that is to say, the said respondent-trustees and the said subscribers agreed among themselves that the original trustees should be the trustees of said property with a provision for succession by virtue of which the respondents came to be and are the trustees of said property and they farther agreed that the subscribers should be the *cestuis qui trustent* of said property with a provision for the transfer of interests, and agreed that said property should be managed all as in said agreement fully set forth, but no more was done in the matter of making or becoming an association.

8. The said agreement and declaration of trust was drawn by counsel. The adhesion of the trustees thereto was obtained. Otherwise the concern or property or trust fund was not organized in any manner whatsoever. The creation of said "real estate trust" as aforesaid took place and still continues under the common law and under the general principles of equity jurisprudence and not under any laws or statutes of the United States or of any State or Territory.

9. The said trustees and the said *cestuis* and shareholders hold no corporate charter franchise or privilege whatsoever. They have no capital stock represented by shares within the meaning of the said Section 38.

10. The said trustees manage the property in their charge for the profit of the beneficiaries or shareholders. They do acts of a character all incidental to the ownership and management of real estate as hereinbefore described. Other than as is in this bill stated they are not engaged in business.

11. Substantially all the net income of the trust property held by the respondents is the net income from real estate. Whatever

small portion is not from such source is the interest on deposits of cash or rents in bank which are the net income of real estate intended for division among the shareholders or beneficiaries or held for the purpose of a sinking or contingent fund as aforesaid.

12. The respondents have been requested by your orator
6 not to make any such return as said law purports to require of corporations, joint stock companies and associations and not to pay any such tax.

It is customary among Boston real estate trusts where there are several trustees to appoint one managing trustee to have charge of the books and moneys and generally to represent the trustees in the management of the trust property. The respondent James G. Freeman is the managing trustee of said Cushing Real Estate Trust.

Counsel for your orator called in person on the respondent James G. Freeman on January 28th, 1910, and on behalf of your orator represented to him as follows:

"Mr. Amory Eliot, as one of your beneficiaries, claims that the provisions of section 38 of the so-called Payne Tariff Act, said section being the so-called corporation tax section, which said act became a law August 5, 1909, do not apply to the Cushing Real Estate Trust and are unconstitutional so far as they purport so to apply. As a shareholder in said trust and as one of your *cestuis qui trustent* he hereby protests against any action by the trustees of said trust or under their direction in voluntarily complying with said tax provisions and he hereby requests that the trustees shall refrain from voluntarily complying with any of said provisions and from voluntarily making said return, and from voluntarily paying said tax and from voluntarily permitting the Commissioner of Internal Revenue by any regularly appointed revenue agent specially designated by him for that purpose to examine any of the books and papers of the trust property held by you and from voluntarily testifying as is in said act provided and producing books or papers.

"He farther requests the trustees to contest the constitutionality of said section or tax provision and to protect your shareholders and *cestuis qui trustent* and to take such steps as may be necessary thereto."

Said counsel for your orator was then and there informed by said respondent James G. Freeman on behalf of all of the respondent-trustees that the respondent-trustees while appreciating that there were doubts as to the constitutionality of said act and its application had decided to comply with the provisions of said act and to make a return thereunder and to leave the contest of said act to other parties.

7 Your orator is informed and believes and avers that said trustees intend to make such a return and pay such a tax and have decided to do so and not to heed or conform to the requests of your orator. Your orator farther shows as he is informed and believes the respondents intend to act upon the ground or grounds that said law requires them to make such a return and to pay such a tax.

Your orator further shows that the voluntary making of such a return and the voluntary payment of such an alleged tax and

obedience to said alleged law will expose the respondents as trustees aforesaid to a multiplicity of suits by and on behalf of their numerous *cestuis qui trustent* which suits will work irreparable injury to the property held in trust by the respondents and waste the same and will work irreparable injury to the interests of the *cestuis qui trustent* aforesaid in said trust fund.

13. In and by said trust agreement it is provided as follows: "The books of the trustees shall at all reasonable times be open to the inspection of any shareholder or his personal representatives." By the general law of equity and trusts in force in Massachusetts today the information proposed to be given by a return under said alleged law for the purpose of making a public record thereof and of levying said alleged tax is information held by the trustees of said property in trust for the private and exclusive use and benefit of said shareholders. If said information is included in said return and said return is made the said shareholders will be irrevocably deprived of their right to said private and exclusive use and will be irreparably injured by the communication thereof to others than shareholders, and the inclusion of said information in said return will be a breach of trust which can not thereafter in any manner whatsoever be undone by the respondents and will substantially damage your orator and others in like case with him.

14. In and by said trust agreement it is further provided that the trustees shall pay to the shareholders such dividends from time to time from the net income as they deem expedient and retain the balance for a contingent or sinking fund.

Your orator is informed and believes and avers that said trustees intend voluntarily to pay on or before June 30th next cur-
8 rent one per cent of said net income in excess of five thousand dollars to the Collector of Internal Revenue as a corporation tax so called under said alleged law. Such a payment will be a breach of their said trust and of the provision of said trust agreement just set forth and your orator and the other subscribers are entitled not to have said breach of trust committed and are entitled by the law of trusts to an injunction restraining said payment and are remediless in a court of common law in and about their said rights. And said voluntary payment will be an irreparable injury to your orator and to others in like case with him.

15. Your orator is informed and believes and therefore avers that the respondents intend under the pretended authority of the fourth clause of said Section 38 or corporation tax act to furnish to the Commissioner of Internal Revenue such further information as he may require and to incur expense in and about the furnishing of such information and to permit regularly appointed revenue agents when specially designated to examine their books and papers as such trustees and to arrange and permit their attendance and the attendance of their officers and employees and to testify and to arrange, permit and procure the testimony of their officers and employees and to produce and to arrange, permit and procure the production of their books and papers and to charge the expense of all such action to the trust fund in their hands and diminish it thereby

and that the doing of these acts will both cause such expense and will be a breach of trust.

16. Your orator is informed and believes that the provisions of Equity Rule 94 do not apply to a bill brought by a *cestui qui trust* of a trust fund not incorporated to have a breach of trust enjoined and to enforce the trusts thereof and for the instruction of the trustees, yet he has for greater safety complied with the provisions thereof. No change in his course was necessary for such compliance. This is not a collusive suit to confer on a United States Court jurisdiction of a case of which it would not otherwise have cognizance.

17. And your orator farther represents that the suit is one of a civil nature cognizable in equity, that the suit arises under the Constitution of the United States and under a law of the United
9 States providing internal revenue and properly cognizable by this Honorable Court.

18. And your orator farther represents that there are a number of shareholders or *cestuis qui trustent* of the trust fund held by the respondents; that this bill is filed for an object common to all of said shareholders and *cestuis* and that your orator brings this bill in his own behalf and in behalf of all others similarly situated with him and as representative of them as a class and on behalf of such shareholders and *cestuis* as aforesaid as may from time to time choose and be permitted to intervene and become parties to this bill.

19. And your orator farther avers that said law or Section 38 of said so-called Tariff Act is unconstitutional and contrary to the Constitution of these United States and void for divers reasons and in divers respects of which your orator further shows specifically the following:

(*a*) Said Section 38 is a measure for raising revenue complete in itself and separable and separate from the rest of said Act of Congress. It originated in the Senate in violation of said Constitution, Article 1, Section 7, which provides that all measures for raising revenue shall originate in the House of Representatives.

(*b*) The said provisions of Section 38 of said Act of Congress above mentioned constitute a violation of the provisions of the Fifth Amendment of the Constitution of the United States, in that they deprive your orator and the other *cestuis qui trustent* and the said respondents as trustees of their liberty and of their property without due process of law and compel some of said persons to be witnesses against themselves, and further, that the said provisions impose no tax of this kind upon individuals, and therefore that said provisions deprive the said *cestuis* and respondent trustees of their liberty and property as aforesaid.

(*c*) The said provisions of Section 38 of said Act of Congress above referred to constitute a direct tax in respect of the property held and owned by the said respondents as trustees which is not laid by Congress in proportion to the census or enumeration in said Constitution directed to be taken.

10 (*d*) Said Section is not a proper exercise of the legislative power granted to Congress, and is in excess of any power dele-

gated to Congress and in violation of the Tenth Amendment to the United States Constitution.

(*e*) Said Section is in respect of the income or profits of the trust fund held by the respondents which accrued and was paid prior to the passage of said law an *ex post facto* law.

(*f*) Said Section violates in cases where the concern taxed is not a corporation (as is true of the trust property and estate held by the respondents) the provision of Article IV of the Amendments to the Constitution.

(*g*) The provisions of said section are not uniform throughout the United States as required by Section 8 of Article I of the Constitution.

This is true *inter alia* because it imposes no tax upon individuals or voluntary associations not having a capital represented by shares and no tax upon the income of a corporation, joint stock company or association exceeding five thousand dollars in value if said income is derived from subsidiary corporations each of which has net income of less than five thousand dollars even if said corporation owns all the shares of said subsidiary corporation and because it imposes no tax on corporations, associations and joint stock companies organized for profit but not having a capital stock divided into shares.

(*h*) Said Section or law is unconstitutional because it purports to levy a tax upon the income from municipal securities and thus and otherwise to tax the several States and their agencies. Your orator shows that it was the intention of Congress as expressed in said Section and is essential and necessary to accomplish the purposes and general scope of said legislation directly to tax real estate and the income thereof as property and personal estate and the income thereof as property and municipal securities and the income thereof as property whenever held by an association joint stock company or corporation and not to confine the law to an excise tax upon the carrying on or doing of business or of any particular business or to an excise tax upon business privileges and employments.

All of which actings, doings and pretences of the said re-
11 spondents are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator in the premises.

Wherefore and in consideration whereof and for as much as your orator is remediless in the premises a. and by the strict rules of the common law and is relievable only in a court of equity where matters of this kind are properly cognizable and relievable.

Your orator prays—

1. That it may be adjudged and decreed that the provisions of the part of said Payne Tariff Act known as the corporation tax are unconstitutional, null and void, and that the respondents be so instructed as trustees as aforesaid.

2. That it may be adjudged and decreed that said provisions do not apply to the respondents and to the property held in trust by them as aforesaid and do not apply to so much of the income or profits of the respondents in their capacity as trustees aforesaid as is the income from real estate or is the income from personal prop-

erty, and that the respondents be so instructed as trustees as aforesaid.

3. For an injunction restraining the respondents and that the respondents be restrained from voluntarily making the said return or paying the said tax or otherwise complying with the provisions of said act.

4. That if the respondents shall *pendente lite* make a return or do any of the acts purporting to be required by said Fourth Clause of Section 38 of said law they be required to make reparation therefor to the trust estate and to pay into the trust fund a sum sufficient to reimburse the same for all expense and loss and all damage which shall have been caused to it by their acts as aforesaid.

5. That the trusts of said agreement be enforced by this court and that the respondent-trustees be instructed by the court that their obligation to perform said trusts is not overridden by said alleged law, and that they are not required to make returns or to pay any tax under said law.

6. And that your orator may have such other or further or different relief in the premises as to a court of equity may seem meet.

To the end, therefore, that the said respondents may, if they can, show why your orators should not have the relief herein and
12 hereby prayed, and may full, true, direct and perfect answer make to the best and utmost of their knowledge, remembrance, information and belief, not under oath—an answer under oath being hereby expressly waived—to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were specially interrogated thereunto; may it please your honors to grant unto your orators a *subpœna ad respondendum* issuing out of and under the seal of this honorable court, to be directed to the said respondents James G. Freeman, Robert A. Boit, Nathaniel Thayer and Robert H. Gardiner, commanding them and each of them on a certain day and under a certain penalty to be therein inserted, to appear before your honors in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises; and, further, to perform and abide by such further order and decree as to your honors shall seem meet; and also a writ of provisional and a writ of perpetual injunction to the same purport, tenor and effect as is hereinbefore set forth and prayed.

And your orator as in duty bound will ever pray.

AMORY ELIOT.

HALE & GRINNELL,
*Solicitors for Complainant.*
RICHARD W. HALE,
FRANK W. GRINNELL,
*Of Counsel.*

13 UNITED STATES OF AMERICA,
*State and District of Massachusetts, ss:*

Amory Eliot, being duly sworn, doth depose and say that he is the complainant named in the foregoing bill of complaint, that deponent has read said bill and knows the contents thereof, that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

AMORY ELIOT.

Subscribed and sworn to before me this eighth day of February, A. D. 1910.

[SEAL.] FRANK W. GRINNELL,
*Notary Public.*

14 (A.)

*The Cushing Real Estate Trust.*

The Trustees hereunder and the subscribers hereto do hereby, on this second day of March, A. D. 1903 (nineteen hundred and three), in consideration of their mutual agreements, make this agreement and declaration of trust, creating a Trust to be known as the "Cushing Real Estate Trust."

1. This Trust is formed for the purpose of purchasing, improving, holding or selling certain lands and buildings in Boston, in the County of Suffolk, and Commonwealth of Massachusetts, hereinafter described, namely:

(*a.*) A certain parcel of land situated on Water Street, with the buildings thereon, formerly four warehouses numbered fifty-one to sixty-five on said street, but now known as the Cushing Building, and numbered seventy-five to eighty-nine, inclusive, and bounded and described as follows: Northerly on Water Street, eighty-four feet eight inches; Easterly on land formerly of Waterston & Pray by a line running through the centre of a partition wall, seventy feet; Southerly on a passageway ten feet in width, sixty-nine feet four inches; Southwesterly on Bath Street, four feet six inches; then turning and running Northerly on land now or late of S. C. Thwing, seven feet ten inches; then turning and running Westerly into a partition wall now or late of H. R. Kendall, ten inches; then turning and running Northerly through the said wall, sixty feet four inches, to a point on Water street distant eight inches from the Easterly side of said wall and bounded Westerly on land now or late of said Kendall, be the said admeasurements more or less, or however otherwise butted or bounded, together with the fee of the aforesaid passageway, ten feet in width, extending from Bath Street Easterly and bounded Northerly by the estate herein described, and Southerly and Easterly by land now or late of Waterston & Pray; subject to all existing easements affecting the same and together also with all the rights and privileges appurtenant to the said estates.

(*b.*) Also a certain lot of land with the buildings thereon
15 situate in Temple Place, bounded and described as follows:
Bounded Northeasterly on said Temple Place, thirty feet; Northwesterly by land and building now or late of Thomas Lee by a line running through the centre of a brick partition wall, sixty-five feet; Southwesterly on land formerly of Williams, thirty feet; and Southeasterly on another land and building by a line running through the centre of the brick partition wall, sixty-four feet, or however otherwise bounded or described, and be all or any of said measurements more or less. Being the premises now numbered twenty-five and twenty-seven in said Temple Place, and being the same premises conveyed to John P. Cushing by deed dated May 16, 1833, and recorded with Suffolk deeds, Lib. 369, fol. 42; and the said premises are subject to the conditions and restrictions, and have all the privileges, appurtenances and rights of way, therein referred to respectively.

2. This Trust shall continue for the term of twenty years after the death of the last survivor of the original Trustees named herein, and of the now living descendants of John P. Cushing, late of Belmont, unless sooner terminated by the act of the shareholders, as provided in Section 10 (ten) of this instrument: said now living descendants being Robert M. Cushing, Grafton D. Cushing, Howard G. Cushing, Olivia C. Andersen, Louisa C. James, Olivia James, Mary James, John P. Cushing, Alice L. Cushing, Edith H. Fairchild, Florence D. Boit, Jane H. Boit, Mary L. Boit and Julia O. Boit.

3. The first Trustees under this instrument shall be James G. Freeman, of Boston, Robert A. Boit, of Brookline, Nathaniel Thayer, of Lancaster, all in the Commonwealth of Massachusetts, and Robert H. Gardiner, of Gardiner, in the State of Maine, who signify their acceptance of the Trust by subscribing their names hereto, and the term "Trustees," as used in this instrument, shall be taken and held to mean the person or persons who may at any time be acting as Trustee or Trustees hereunder. The title of the Trustees shall be "Trustees of the Cushing Real Estate Trust," and any property conveyed to them under that description shall be held by them as Trustees under this instrument.

Any Trustee may by a written instrument, signed, acknowledged
and recorded in the Suffolk County Registry of Deeds, in said
16 Commonwealth, resign his office. Any vacancy or vacancies
in the number of Trustees, however caused, may be filled by appointment under the hand and seal of any shareholder who actually owns at the time when the vacancy occurs not less than twelve hundred shares of the trust, and in case at the time of such vacancy there shall be more than one shareholder so owning twelve hundred or more shares, then each such shareholder may so appoint a Trustee, and the number of Trustees hereunder shall be *ipso facto* increased accordingly; every such appointment in order to be valid must be acknowledged like a deed of land, and recorded in Suffolk County Registry of Deeds. And if no such appointment shall be duly made within the period of ninety days from the occurrence of the vacancy then the vacancy, however caused, may be filled by the remaining Trustee or Trustees, by a written instrument signed, ac-

knowledged and recorded in said Suffolk County Registry of Deeds, and such appointment shall be final unless revoked by the act of the shareholders, as provided in Section 10 (ten) of this instrument. Until such appointment, the remaining Trustee or Trustees, and after such appointment, the new Trustee or Trustees, jointly with the remaining Trustee or Trustees, and their successors from time to time, however appointed, shall be fully vested with the same powers, rights, title and interest, duties and liabilities in and concerning the Trust estate and property, and be subject to the same duties as the original Trustees hereunder. It is, however, expressly provided that no person shall be eligible as Trustee under this Instrument who is not a resident of Massachusetts, or if not such resident, has not a usual place of business in said Boston.

4. The Trustees under this instrument are authorized to expend any money coming to them from time to time from the subscribers to this instrument and their assigns, or otherwise, and such portion of the income from the property held by them as may seem best to them, in their uncontrolled discretion, in the improvement, by building or otherwise, of the real estate described in Section 1 of this instrument, and in the purchase of fixtures and fittings therefor, or in the payment of any obligation of the Trust; they may also invest in such property as they deem desirable; they shall have as such Trustees as absolute control over and disposal of all property held
17 by them at any time under this Trust as if they were the sole beneficial owners thereof, including, but not hereby restricting the preceding generality, the power to sell for cash or credit at public or private sale, free and discharged of all trusts (and no purchaser shall be liable for the application of money paid), to lease or hire for improvement or otherwise for a term beyond the duration of this Trust, or for any less term, to let, to exchange, to release, and to partition and also to compromise and settle claims of every name and nature against them or the Trust property. They may also create, obtain and release easements, may adjust boundaries, may make agreements as to party walls, and generally may make, execute and deliver all manner of deeds, agreements and conveyances for the purpose of managing and controlling, or conveying the trust property which shall at any time seem to them desirable or expedient. They shall also have power to borrow money for temporary exigencies and give notes therefor binding the assets of the Trust, but not the Trustees or shareholders personally, and shall not owe for such temporary exigencies more than fifty thousand dollars at one time; but no lender of money to said Trustees shall be bound to inquire as to the indebtedness of the Trustees to any other person or persons, nor be liable in any way for the application of the money lent.

The Trustees shall have the exclusive management of all the property at any time held by them, and shall manage said property as they shall deem for the best interest of the shareholders.

They shall pay to the shareholders such dividends, from time to time, from the net income or from the net profits of sales made, as they deem expedient, and shall retain the balance to be expended in their discretion, as is hereinbefore provided, or for a contingent or

sinking fund; during any period of construction or alteration of any building, and for six months thereafter, the Trustees may pay from capital, as part of the cost of such construction or alteration, sums of money, not exceeding four per centum per annum on the value, as determined by the Trustees, of such building and the land appurtenant thereto, and may divide such sums among the shareholders as and for net income received during said period; and the decisions of the Trustees as to what charges shall be made to capital and what to income shall be final.

18 The said Trustees shall keep a register of the names and interests of the shareholders hereunder, and proper transfer books and books of account, and the books of the Trustees shall at all reasonable times be open to the inspection of any shareholder or his personal representative.

Upon the termination of the Trust, in accordance with Section 2 of this instrument, the Trustees shall sell the Trust property and divide the net proceeds of sale and all other property of the Trust then in their possession among the then shareholders in proportion to their respective interests.

5. In every written contract made by the Trustees, reference shall be made to this instrument, and the person or corporation contracting with them shall look to the funds and property of the Trust for payment of any debt, note, judgment or decree, or of any money that may otherwise become due and payable by reason of the failure on the part of said Trustees to perform such contract in whole or in part, or for any other cause, and neither the Trustees nor the shareholders, present or future, shall in any event be personally liable therefor; and the said Trustees shall have full power to compromise and settle claims either in contract or tort, made against them or against said Trust property. No Trustee hereunder shall be liable in any event for the acts or omissions of his co-trustee or of any other person whatsoever, whether employed by him or not, not for anything other than his own personal breach of trust, and no bond or surety shall ever be required of any Trustee acting hereunder. The Trustees may authorize one of their number to have the possession of the Trust books and Trust moneys, and to make collections and disbursements thereof. In case of the absence from the United States, or incapacity of any Trustee hereunder, his co-trustee or co-trustees may exercise all his powers and perform all his duties, and he shall not be liable for the acts or omissions of his co-trustee or co-trustees during such period or for any losses arising therefrom, and the certificate of any Trustee as to such absence or disability shall be conclusive; and each Trustee hereunder shall be entitled to indemnity from the Trust property for any personal liability by him in-

19 curred in the administration of this Trust, except such as may arise from his personal and wilful default.

6. The compensation of the Trustees for their personal service shall be five per cent per annum of the gross income of the Trust property, and in cases of construction or reconstruction of buildings they shall have a reasonable compensation in addition which may be charged to capital.

7. The Trustees hereunder shall issue forty-eight hundred shares

hereunder in payment for the property conveyed to them at the inception of this Trust.

8. The Trustees shall issue certificates of shares as aforesaid in such form as they shall deem best, signed by at least a majority of the Trustees, in shares of one hundred dollars each, and no certificates shall ever be issued for less than one share. The shares held by any shareholder hereunder may be transferred on the books of the Trustees upon surrender of the certificate and a transfer thereof in writing, and a new certificate shall thereupon be issued to the transferee, who shall by the acceptance of the certificate become a party to this instrument as fully as if he were an original subscriber hereto. In case of loss or accidental destruction of a certificate, the Trustees may issue a new certificate on such terms as they may see fit. The name in which the certificate stands upon the books of the Trustees shall be considered by them conclusive evidence of ownership of the shares, and it shall not be the duty of the Trustees upon transferring such certificates or paying dividends, or at any other time, to inquire in any way into the relations between assignor and assignee, pledgor or pledgee, or trustee and *cestui que trust*.

No shareholder shall have as such any legal title to the trust property itself, real or personal, held from time to time by the Trustees, his interest being equitable only; and he shall have no right to call for any partition during the continuance of the Trust. No transfer by operation of law of the interest of a shareholder during the continuance of this Trust shall operate to determine the Trust, nor shall it entitle his legal representative to an account, or to take any action in the courts or otherwise, against the Trust or Trustees; but the legal representatives of such shareholder shall succeed to all his rights under this Trust, upon production of the evidence of such transfer.

9. No assessment shall ever be made upon shareholders.

10. The shareholders may at any time by an instrument or instruments in writing signed by not less than three fourths in value of the shareholders and acknowledged by one of the signers in the manner prescribed for the acknowledgment of deeds, and recorded in said Suffolk County Registry of Deeds, direct the said Trustees to terminate this Trust and sell the Trust property and distribute the proceeds proportionately among the shareholders, or to convey the Trust property to new or other Trustees, under a new Declaration of Trust, or to a corporation, as they may direct, and the Trustees shall obey such directions, being first duly indemnified for any outstanding obligations, and compliance with such direction shall relieve the said Trustees from any further liability to any person whatsoever; and the shareholders may in like manner remove a Trustee or Trustees under this instrument, or revoke the appointment of a Trustee by the surviving or remaining Trustee, or Trustees, and name a new Trustee or Trustees under this instrument, who shall succeed to the title of the former Trustee or Trustees in the said Trust property, and become a party to this instrument as fully as if he or they had been the original Trustees hereunder, upon the acceptance of the Trust by him or them in writing duly acknowledged and recorded with said Registry of Deeds; they shall in like manner

appoint a new Trustee or Trustees, in case of the failure of the surviving or remaining Trustee or Trustees to do so; or in case of the death or disability of all the Trustees; and the shareholders in like manner may amend this instrument in any respect, except to extend the duration of this Trust, and such amendments and all instruments signed and recorded as above directed shall be binding upon all the shareholders, and upon the Trustees, but the vested rights of third persons shall not be affected thereby.

11. Meetings of the shareholders shall be held in said city of Boston, and may be called by said Trustees or either of them at any time, and shall be called by said Trustees when requested in writing so to do by five shareholders, or by shareholders owning not less than one tenth in value of the shares, or in case there is no Trustee, or the said request in writing is not complied with, then the same number or proportion of shareholders as above may call said meeting
21 by notice mailed, postage prepaid, five days before the date of said meeting, to each shareholder, or his attorney designated for the purpose, at his post-office address. For all purposes except such as are specified in Section 10 (ten) of this instrument, for which the method of procedure is directed therein, a quorum at any meeting shall consist of not less than three shareholders representing either in person or by proxy not less than one third of the total number of shares. Shareholders may vote by proxy; each share of stock shall be entitled to one vote; and a majority of the votes present or represented shall determine any questions before the meeting. A certificate signed and acknowledged by one of the Trustees or by the clerk of the meeting, and recorded in said Suffolk County Registry of Deeds, containing a copy of the record of any of their proceedings, shall be conclusive evidence of all the facts therein stated.

In witness whereof, the said Trustees have hereto set their hands and seals, and the said shareholders have hereto set their hands and seals and stated the amounts of their respective subscriptions, each adopting the seal hereto affixed as their common seal, on the day and year first above written.

JAMES G. FREEMAN,
ROBERT A. BOIT,
NATHANIEL THAYER,
ROBERT H. GARDINER,
*Trustees as Aforesaid.* [SEAL.]

| Name. | | Amount. |
|---|---|---|
| — — | Shareholders..... | — |
| — — | | — |
| — — | | — |

22 B.

Know all men by these presents that we, the undersigned shareholders in the Cushing Real Estate Trust under an Agreement and Declaration of Trust, dated March 2, 1903, and recorded with Suffolk Deeds, Book 2919 page 577, the owners and holders of not less than

three-fourths in value of the shares now outstanding, acting by virtue and in execution of the power and authority to us given in and by said Agreement and Declaration of Trust, and every power and authority us hereto enabling, do hereby amend the Fourth Article of said Agreement and Declaration of Trust by inserting in the first paragraph thereof, after the words "free and discharged of all trusts" a comma, and the words "to mortgage," and in the parenthesis immediately following, after the word "purchaser" the words "or mortgagee" and after the words "money paid" the words "or lent" so that the first sentence in said first paragraph of said Article 4 shall read as follows:

"4. The Trustees under this instrument are authorized to expend any money coming to them from time to time from the subscribers to this instrument and their assigns, or otherwise, and such portion of the income from the property held by them as may seem best to them, in their uncontrolled discretion, in the improvement, by building or otherwise, of the real estate described in Section 1 of this instrument, and in the purchase of fixtures and fittings therefor, or in the payment of any obligation of the Trust; they may also *also* invest in such property as they deem desirable; they shall have as such Trustees as absolute control over and disposal of all property held by them at any time under this Trust as if they were the sole beneficial owners thereof, including, but not hereby restricting the preceding generality, the power to sell for cash or credit at public or private sale, free and discharged of all trusts, to mortgage (and no purchaser or mortgagee shall be liable for the application of money paid or lent), to lease or hire for improvement or otherwise for a term beyond the duration of this Trust, or for any less term, to let, to exchange, to release, and to partition and also to compromise and settle claims of every name and nature against them or the Trust property."

In witness whereof, we hereunto set our hands and common seal, and state against our respective signatures the number of shares held by us respectively, this twenty-second day of July, A. D. 1907.

23 On the fifteenth day of February, A. D. 1910, the following Demurrer is filed:

*Demurrer.*

(Filed Feb. 15, 1910.)

These respondents, by protestation, not confessing or acknowledging all or any of the matters or things in said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill and for cause of demurrer show that said bill doth not contain any matter of equity whereon this Court can ground any decree or give to the complainant any relief against these defendants or any one or more of them, and that it appeareth by the complainant's own showing by the said bill that he is not entitled to the relief prayed by the said bill against these respondents.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these respondents separately and severally demur thereto and pray the judgment of this Honorable Court whether they shall be compelled to make any answer to said bill, and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

ARTHUR D. HILL,
*Solicitor for Respondents.*

24 I, Arthur Dehon Hill, counsel for the respondents in the above cause, do hereby certify that the foregoing demurrer to the bill of complaint is, in my opinion, well founded in law.

ARTHUR DEHON HILL.

UNITED STATES OF AMERICA,
*District of Massachusetts, ss:*

I, James G. Freeman, being duly sworn, depose and say: That I am one of the respondents above named and that the foregoing demurrer is not interposed for purposes of delay.

Sworn to before me, this 14th day of February, 1910.
[SEAL.] JAMES J. O'BRIEN,
*Notary Public.*

25 Thereupon, to wit, February 16, 1910, this cause is set down for hearing on demurrer and is fully heard by the Court, the Honorable Francis C. Lowell, Circuit Judge, sitting, and an opinion of the Court is announced, sustaining said demurrer.

On the same day, the following Final Decree is entered:

*Final Decree.*

February 16, 1910.

LOWELL, *J.:*

This cause having come on to be heard upon the bill and the demurrer thereto, and having been argued by counsel, it is by the Court now here ordered and decreed that the said demurrer be sustained and that the bill of complaint above named be and the same is hereby dismissed with costs.

By the Court:

CHARLES K. DARLING, *Clerk.*

A true record:
Attest:
CHARLES K. DARLING, *Clerk.*

26 *Judge's Certificate of Claim for Appeal.*

Thereupen, the above named complainant states that in this case the constitutionality of a law of the United States is drawn in question, and in open Court prays an appeal from said final

decree direct to the Supreme Court of the United States, pursuant to the statute in such case made and provided.

It is, therefore, further ordered that the said appeal be and the same hereby is allowed as prayed for in open Court.

The said defendants then admitted in open Court due notice of the said appeal and duly waived service of any citation thereon.

FRANCIS C. LOWELL,
*U. S. Circ. Judge.*

27 *Opinion of the Court.*

February 16, 1910.

LOWELL, *J.:*

This is a bill in equity brought by a cestui qui trust and shareholder against the trustees, holding under the Cushing Real Estate Trust. The object of the bill is to enjoin the trustees from making returns and paying the so-called Corporation Tax to the United States under the Act of August 5, 1909, Chap. 6, Sect. 38. The respondents demurred to the bill.

The complainant contends that the Act is unconstitutional. In case of a statute like this, passed by Congress after deliberation, the question of constitutionality may well be left by the Circuit Court to the Supreme Court.

The complainant further contends that the trust is not within the provisions of the Act, for these reasons, viz:

First, it has no capital stock. The declaration of trust provides for the issuance of "forty eight hundred shares," and for the issuance of "certificates of shares." These shares are made transferable. So far as this objection is concerned, the Trust is an association within the terms of the Act.

Second, the complainant further contends that the trust is not "organized under the laws * * * of any State." It is the contention of the complainant that the word "laws" is here used as the equivalent of "statutes," and the trust was formed irrespec-
28 tive of statute. With something more of doubt, I think the complainant is here wrong.

Third, the complainant further contends that the Trust and trustees are not "engaged in business." While the trust is concerned in the management of real estate and the profits are derived chiefly from its rents, yet I am of opinion that the language of the Act should be construed broadly, even to include the business of this Trust. For these reasons the respondent's demurrer is sustained.

29 *Assignment of Errors.*

(Filed February 16, 1910.)

And now comes the complainant above-named by Frank W. Grinnell, his solicitor, and in connection with the complainant's petition of appeal from the final decree made and entered herein on

the sixteenth day of February 1910, dismissing the complainant's bill of complaint with costs, makes and files the following assignment of errors in pursuance of the statute and rule in such case made and provided:

I. That the Court erred in not holding that so much of the act of Congress of the United States, entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes," approved August 5, 1909, as relates to the assessment and collecting of a tax on the net income of corporations, joint stock companies and associations and the filing of returns as specified in section 38 of the said act, was unconstitutional and void in that such section violates sections 2, 7, 8 and 9 of Article I, and amendments IV., V., and X. of the Constitution of the United States.

II. That the Court erred in not holding that said Section 38 does not apply to said respondent trustees or to the property held in trust by them.

III. That the Court erred in not granting to the complainant the relief prayed in and by his bill or any part thereof.

IV. That the Court erred in sustaining the demurrer to said bill.

V. That the Court erred in dismissing the said bill with costs.

FRANK W. GRINNELL,
*Solicitor for Complainant.*

30 *Bond on Appeal.*

(Filed and Approved Feb. 16, 1910.)

Know all men by these presents, That we, Amory Eliot, of Manchester, in the County of Essex and State of Massachusetts, as principal, and Massachusetts Bonding and Insurance Company, as surety, are held and firmly bound unto the above named respondents in the sum of five hundred dollars ($500) to be paid to the said respondents; for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with my seal and dated the sixteenth day of February in the year of our Lord one thousand nine hundred and ten.

The condition of this obligation is such that,—

Whereas, the said defendants above named have obtained a decree in the Circuit Court of the United States for the District of Massachusetts sustaining the defendants' demurrer and dismissing the bill of complaint of the complainant with costs, which said decree was entered on the sixteenth day of February, 1910, and

31 Whereas the said complainant, in order to obtain the reversal of the same hath obtained the allowance in open court of a petition of appeal to the Supreme Court of the United States:

Now, therefore, if the above named Amory Eliot shall prosecute his said appeal to effect, and if he fail to make his appeal good, shall

answer all damages and costs, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

[SEAL.] AMORY ELIOT.
[SEAL.] MASSACHUSETTS BONDING AND INSURANCE COMPANY,
By E. M. LAMPHIER, *Vice-President, and*
R. L. DE NORMANDIE, *Secretary.*

Sealed and delivered and taken and acknowledged this sixteenth day of February, 1910.

[SEAL.] FREDERICK GUTTERSON,
*Notary Public.*

Approved by:
FRANCIS C. LOWELL,
*Circ. Judge.*

32 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to James G. Freeman, of Weston, formerly of Boston; Robert A. Boit, of Brookline; Nathaniel Thayer, of Lancaster, all in the Commonwealth and District of Massachusetts, and Robert H. Gardiner, of Gardiner, in the State and District of Maine, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the* eighteenth day of February current, pursuant to an Appeal duly obtained from a decree of the† Circuit Court of the United States for the District of Massachusetts wherein Amory Eliot, of Manchester, in the Commonwealth and District of Massachusetts, is appellant and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Francis C. Lowell, Judge of the Circuit Court of the United States for the District of Massachusetts this sixteenth day of February, in the year of our Lord one thousand nine hundred and ten.

FRANCIS C. LOWELL,
*U. S. Circuit Judge.*

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*Not exceeding 30 days from the day of signing.
†Name of Court in which the Decree is entered.

33 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
*District of Massachusetts, ss:*

I, Charles K. Darling, Clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the foregoing is a true copy of the record and all proceedings in the cause in equity entitled, No. 686, Amory Eliot, Complainant, v. James G. Freeman et al., Defendants, in said Circuit Court determined, Judge's Certificate of Claim for Appeal, the Assignment of Errors, the Bond on Appeal and also the original Citation issued upon the appeal of the complainant in said cause.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said District, this sixteenth day of February, A. D. 1910.

[Seal of the Circuit Court, Massachusetts.]

CHARLES K. DARLING, *Clerk.*

Endorsed on cover: File No. 22,028. Massachusetts C. C. U. S. Term No. 802. Amory Eliot, appellant, vs. James G. Freeman, Robert A. Boit, Nathaniel Thayer, and Robert H. Gardiner. Filed February 17th, 1910. File No. 22,028.

(22,095)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1909.**

## No. 869.

MAINE BAPTIST MISSIONARY CONVENTION, APPELLANT,

*vs.*

CHARLES E. COTTING AND CHARLES F. ADAMS, 2D, TRUSTEES, &c.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 9, 1910.

1 *Transcript of Record of Circuit Court.*

UNITED STATES OF AMERICA;
*District of Massachusetts, ss:*

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on Wednesday, the twenty third day of February, the last Tuesday of February being a legal holiday, in the year of our Lord one thousand nine hundred and ten.

Before the Honorable Francis C. Lowell, Circuit Judge.

No. 705. Equity Docket.

MAINE BAPTIST MISSIONARY CONVENTION, Complainant,
v.
CHARLES E. COTTING et al., Trustees, Defendants.

2 The Bill of Complaint in this cause is filed in the clerk's office on the eighth day of April, A. D. 1910, and is duly entered at the present February Term of this Court, A. D. 1910, and is in the words and figures following:

3 *Bill of Complaint.*

(Filed April 8, 1910.)

To the Honorable the Judges of the Circuit Court of the United States for the District of Massachusetts:

Maine Baptist Missionary Convention, a corporation duly organized and existing under the laws of the State of Maine, and having a usual place of business in the city of Portland, in said State, brings this its bill of complaint against Charles E. Cotting of Boston, in the County of Suffolk, and Charles F. Adams, 2d, of Concord, in the County of Middlesex, both in the Commonwealth of Massachusetts, as they are Trustees under an Agreement and Declaration of Trust, dated February 12, 1903, and recorded in the Registry of Deeds for the County of Suffolk in said Commonwealth, Book 2924, page 274.

And thereupon your orator complains and says:

(1) That it is a resident of the city of Portland in the State of Maine and a citizen of said State within the meaning of the laws fixing and determining the jurisdiction of your Honorable Court, and brings this its bill of complaint in behalf of itself and all
4 others similarly situated as *cestuis que trustent* or holders of certificates representing the beneficial interest in said trust, and who shall be entitled to avail themselves of the benefit of this suit against said Trustees.

(2) That the defendant, Charles E. Cotting, is a resident of Boston, and the defendant, Charles F. Adams, 2d, is a resident of Concord, both in the Commonwealth of Massachusetts, and both said defendants are citizens of said Commonwealth within the meaning of the laws fixing and determining the jurisdiction of your Honorable Court, and that said defendants are the Trustees under an Agreement and Declaration of Trust, dated February 12, 1903, and recorded in the Registry of Deeds for the County of Suffolk, in said Commonwealth, Book 2924, page 274, a copy of said Agreement and Declaration of Trust being hereto annexed and marked Exhibit "A"; and that said trust is commonly known as the Department Store Trust.

(3) That this suit is one of a civil nature cognizable in equity; that it arises under the constitution and laws of the United States; that the suit is a controversy between citizens of different states, and that the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars ($2,000), and that the suit arises under the internal revenue laws of the United States.

(4) That said Department Store Trust was created and exists solely under and by virtue of said agreement and declaration of trust hereinbefore referred to; that said agreement was made on or about the date stated therein by the subscribers thereto and by said
5 Trustees for the purpose of purchasing and holding a certain parcel of land in said City of Boston described therein; that subscriptions to said agreement and declaration of trust were duly made thereto in the total amount of three million dollars ($3,000,000), and of said amount a part was paid in cash and a part was represented by the value of a portion of the desired property which was conveyed to said Trustees at an agreed valuation; that the Trustees, upon payment of such subscriptions as aforesaid, issued to the respective subscribers certificates of interest in shares of one hundred dollars ($100) each for each one hundred dollars ($100) of such subscriptions, a copy of one of such certificates being hereto annexed and marked Exhibit "B"; and that your orator is and since long prior to January 1, 1909, has been continuously the owner of twenty-eight (28) of said shares of the beneficial interest of said Department Store Trust; that said agreement and declaration of trust has been altered or amended by proceedings duly had in accordance with paragraph numbered eight thereof by the granting to the Trustees of power and authority to mortgage said property to the total amount of three million five hundred thousand dollars ($3,500,000) instead of three million dollars ($3,000,000), but that otherwise said agreement remains in said original form and is still in force and operative and the defendants are the trustees thereunder duly qualified and are acting as such.

(5) That said Department Store Trust is not a corporation, joint stock company or association organized under any general or special law of the United States or of the Commonwealth of Massa-
6 chusetts or of any other state or jurisdiction; that said trust exists solely by virtue of the agreement and declaration of trust hereinbefore referred to; that it is not an artificial entity, but

embodies merely a method or form of the exercise of individual rights and powers by the parties thereto as Trustees and *cestuis que trustent;* that said trust has no officers and no by-laws or other rules or regulations, but said Trustees act solely under said agreement and declaration of trust, and that the rights and remedies as between the Trustees and the *cestuis que trustent* and as between the parties to said agreement and third persons, are controlled and regulated by the common principles of law applicable to trusts and to contracts, and to the relations of individuals *inter sese;* and that the parties to said trust have and exercise no corporate facility or privilege; that neither said trust nor the parties thereto have any charter, franchise, license or any grant or privilege of any kind from the State or from any governmental authority; that said trust has no capital stock represented by shares, but that said certificates issued by the Trustees represent or evidence only parts of the beneficial interest under said trust in and to the property held by the Trustees; that said trust differs in no substantial respect from the common and usual forms of trust except in the fact that the beneficial interest thereunder is represented or evidenced by such certificates to the end that such beneficial interests may be more conveniently held and transferred by large numbers of parties in interest.

(6) That the said Trustees secured the property described in said agreement and declaration of trust with the exception of a small portion comprising the northeasterly corner of said block, 7 which portion was purchased subject to a lease to one Dreyfus et al., to expire May 31, 1912, which lease is still in effect; and that the proposed building was erected to cover said entire property excepting said Dreyfus parcel; that the net cost of said land and building was approximately six million two hundred and fifty thousand dollars ($6,250,000) and that said land and building are subject to two mortgages given by said Trustees to the total aggregate amount of three million five hundred thousand dollars ($3,500,000); that said Trustees also provided certain fixtures and furnishings in and for said building at a cost of two hundred and fifty thousand dollars ($250,000); that on or about July 1, 1905, said land and building and said fixtures and furnishings were leased to one Seigel, et al., for the term of thirty years from said date, at a yearly rental of approximately two hundred ninety-seven thousand five hundred dollars ($297,500); and that in and by said lease the lessees named therein covenanted also to pay all taxes, insurance premiums on buildings, boilers, elevators, general liability and rents to an amount in the opinion of the Lessors reasonably sufficient to protect them and not exceeding the amount of insurance obtainable, and all assessments whatsoever which may be assessed on the land and the buildings thereon or any part thereof, except assessments for betterments, and to pay as additional rent interest at the rate of four and one-half (4½) per cent per annum upon all sums of money which may be assessed for betterments upon the leased premises, and also all charges for water, and to keep all and singular the demised premises in such repair, order and condition as the same were in at the commencement

of said term or may be put in during the continuance thereof, reasonable wear and tear, damage by fire or other unavoidable
8 casualty only excepted, and also to do all inside and outside repairs; that said lease included said Dreyfus parcel subject to the outstanding lease thereof; the rental under said outstanding lease to be credited to said Seigel, et al. as Lessees under said lease from said Trustees.

(7) That said Trustees of said Department Store Trust hold no property other than that hereinbefore described, and that the said Trustees receive from said Lessees the said annual rental of approximately two hundred ninety-seven thousand five hundred dollars ($297,500), and that they receive and pay over to the proper authorities the amounts laid as taxes and assessments upon said property; that they pay at stated times the amounts of interest due upon said mortgages and that they pay over such amounts out of the net income received and at such times as in their judgment should properly be paid unto the *cestuis que trustent* according to their respective interests, and that they perform minor duties and maintain a bank account in their names as such Trustees, and that apart from the foregoing the defendants as such Trustees do no other acts or things with reference to said property or said trust, and that they are not engaged in carrying on or doing business, and that the sole income of the defendants as such Trustees of the Department Store Trust is the income hereinbefore stated from said real estate and said fixtures and furnishings therein, and such interest as is paid from time to time upon said bank deposits; that the net income or proceeds of the defendants as Trustees of said Department Store Trust for the year ending December 31, 1909, is largely in excess of the sum of five thousand dollars ($5,000) after deducting from the gross amount of such income all expenses, charges, losses not compensated by insurance, reasonable
9 allowances for depreciation, interest and taxes paid out of or allowed against such income during said year, and does not include amounts, if any, received by them within the year as dividends upon the stock of corporations, joint stock companies or associations or insurance companies subject to such tax; that the said defendants and the said trust are not a labor, agricultural or horticultural organization nor a fraternal beneficiary society, order or association, nor a domestic building and loan association, nor are they organized and operated exclusively for religious, charitable or educational purposes.

(8) That said defendants, Trustees as aforesaid, claim and assert that as Trustees of said Department Store Trust they are subject to the provisions of Section 38 of an act of Congress entitled "An act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes," approved August 5, 1909, and that said defendants as such Trustees have made or purported to make a return under and by virtue of the alleged authority of the provisions of said Section 38, and that said defendants further claim and assert that as such Trustees of the Department Store

Trust, they are required on or before the first day of March in each year hereafter to make a like return with respect to the year ending with the thirty-first day of December preceding, and that as such Trustees of the Department Store Trust they are also liable, under and by virtue of the authority of said Section 38, to pay on or before the thirtieth day of June, 1910, and on or before the thirtieth day of June in each year thereafter, an assessment described in said Section 38 as an excise tax with respect to the carrying on or doing business and equivalent to one per centum upon the entire
10 net income over and above five thousand dollars ($5,000) received by them as such Trustees from all sources during the year ending with the thirty-first day of December next preceding; that your orator is advised by counsel that the provisions of said Section 38 of said act of Congress do not apply to said Department Store Trust and that if said provisions do so apply, then that as to such Department Store Trust said act of Congress is unconstitutional and void.

(9) That the defendants as Trustees of said Department Store Trust have heretofore been expressly requested on behalf of your orator to refrain from voluntarily preparing and filing any return or returns under the provisions of said Section 38 of said act of Congress and to refrain from voluntarily making any payment or payments of any assessment or assessments, tax or taxes, levied or purported to be levied under the alleged authority of said section and to contest the obtaining by the government of the information to be embodied in said returns and the collection of such taxes or assessments, on the grounds that said Section 38 is not applicable to said Department Store Trust and to the defendants as Trustees thereof, and that if said act is so applicable then that as to said trust and the defendants as such Trustees, said section is unconstitutional; and that said defendants as such Trustees have refused to comply with said requests, but on the contrary, on or about March 1, 1910, voluntarily prepared and filed or purported to file a return and intend voluntarily to pay, and unless restrained by injunction from this Honorable Court, will so pay on or before June 30, 1910, an assessment or tax under the alleged authority of said section and on information and belief that said defendants intend in each year hereafter voluntarily to prepare and file returns and voluntarily to pay
11 such taxes or assessments and unless restrained by injunction of this Honorable Court will so prepare and file such returns and will so pay such taxes or assessments in each year, all to the great damage and injury of your orator and other *cestuis que trustent* similarly situated, and that the Collector of Internal Revenue of the United States claims and asserts likewise that said returns are required to be made and that such taxes or assessments are required to be paid by said Trustees and will receive the same.

(10) That pursuant to the terms of said Section 38 of said act of Congress the said return or returns, if made, are required as the same are received by the Collector of Internal Revenue to be transmitted forthwith by him to the Commissioner of Internal Revenue; that all such returns are required to be retained by the Commissioner of

Internal Revenue who shall make assessment thereon on or before the first day of June, 1910, and on or before the first day of June in each year thereafter, and that when the assessment is so made all of said returns are required to be filed in the office of the Commissioner of Internal Revenue, to constitute public records and to be open to inspection as such.

(11) Your orator charges that said Section 38 of said act of Congress is not applicable to said Department Store Trust or to the defendants as Trustees thereof, and that neither said trust nor other real estate trusts similarly constituted were intended by Congress to be included within the scope or effect of said section and your orator further charges that if said section is so applicable to such real estate trusts and especially to such Department Store Trust and to the defendants as Trustees thereof, then that said section is wholly
12 unconstitutional and void and particularly that said section is unconstitutional and void so far as so applicable. And for grounds of such unconstitutionality your orator shows the following:

(*a*) That the tax imposed by said section is in fact and in legal effect a direct tax and is not apportioned among the several states, and is, therefore, in violation of the constitution of the United States and particularly of Sections 2 and 9 of Article I thereof.

(*b*) That the tax imposed by said section, if and as applicable to said Department Store Trust or the defendants as Trustees thereof, is in fact and in legal effect a direct tax and is not apportioned among the several states, and is therefore as to said Department Store Trust and said defendants as Trustees thereof in violation of the constitution of the United States and particularly of Sections 2 and 9 of Article I thereof.

(*c*) That the provisions of said section requiring preparation and filing of returns and constituting the same public records would destroy the privacy of the business affairs of the defendants as Trustees of the Department Store Trust and involve depriving said defendants and said trust of their property without due process of law and a taking of their property for public use without just compensation, all in violation of the constitution of the United States and particularly the Fifth Amendment thereto.

(*d*) That the provisions of said section requiring the preparation and filing of said returns and constituting the same public
13 records and requiring payment of such tax, involve depriving said trust and the defendants as Trustees thereof of their property without due process of law and a taking of their property for public use without just compensation, all in violation of the constitution of the United States and particularly of the Fifth Amendment thereto.

(*e*) That the provisions of said section, if and as applicable to said Department Store Trust or the defendants as Trustees thereof or the *cestuis que trustent* thereunder, involve depriving of all parties in interest therein of their property without due process of law and a taking of their property for public use without just compensation in violation of the constitution of the United States and particularly of the Fifth Amendment thereto.

(*f*) That the provisions of said section, if and is applicable to said Department Store Trust or the defendants as Trustees thereof or the *cestuis que trustent* thereunder, involve depriving of all parties in interest therein of their respective rights to act as Trustees and *cestuis que trustent* and as such to deal with property, to own and lease the same and to receive the rents and income therefrom, all in violation of the constitution of the United States and particularly of the Fifth Amendment thereto.

(*g*) That the provisions of said section, if and as applicable to said Department Store Trust or the defendants as Trustees thereof or the *cestuis que trustent* thereunder and inasmuch as the same are not applicable to individuals and copartnerships, involve the depriving of all the parties in interest of their property without due
14 process of law, in violation of the Constitution of the United States and particularly of the Fifth Amendment thereto.

(*h*) That the provisions of said section, if and as applicable to said Department Store Trust and to the defendants as Trustees thereof, impose a tax upon individuals when acting and holding property in a trust capacity, which tax is not imposed upon individuals acting or holding property other than in such trust capacity, and which tax therefore involves arbitrary and not reasonable classification, in violation of the Constitution of the United States and particularly of the inherent conditions and requirements in the grant of the taxing power to Congress, and deprives said Trust Estate and all parties interested therein of liberty and property without due process of law in violation of the Constitution of the United States and particularly of the Fifth Amendment thereto.

(*i*) That the tax imposed by said section if and as applicable to said Department Store Trust or the defendants as Trustees thereof or the *cestuis que trustent,* and inasmuch as said tax is not applicable to and is not imposed upon trusts existing under wills or under agreements or declarations of trust in which the beneficial interests, irrespective of the number of beneficiaries thereunder, are not represented by certificates, involves arbitrary and not reasonable classification, in violation of the Constitution of the United States and particularly of the inherent conditions and requirements in the grant of the taxing power to Congress, and deprives said Trust Estate and all parties interested therein of liberty and property without due process of law in violation of the Constitution of the United States, and particularly of the Fifth Amendment thereto.

15 (*j*) That the provisions of said section requiring the preparation and filing of returns are not a proper exercise of any power granted the Congress of the United States, but are in excess of any power so delegated, in violation of the constitution of the United States and particularly of the Tenth Amendment thereto.

(*k*) That the provisions of said section are not a proper exercise of any power granted the Congress of the United States but are in excess of any power so delegated, in violation of the constitution of the United States and particularly of the Tenth Amendment thereto.

*Wherefore,* and, in consideration whereof and forasmuch as your orator is remediless in the premises at and by the strict rules of the

common law and is relievable only in a court of equity where matters of this nature are properly cognizable and relievable, your orator prays:

(1) That it may be adjudged and decreed that the provisions of said Section 38 of said act of Congress approved Augusst 5, 1909, have no application to said Department Store Trust or to the defendants as Trustees thereunder.

(2) That if the Court shall be of the opinion that said Section 38 of said act of Congress applies to said Department Store Trust or to the defendants as Trustees thereof, it may be adjudged and decreed that the provisions of said section are unconstitutional and void.

(3) That if the Court shall be of the opinion that said Section 38 of said act of Congress applies to said Department Store
16 Trust or to the defendants as Trustees thereof, it may be adjudged and decreed that the provisions of said section so far as the same do so apply, are unconstitutional and void.

(4) That the defendants, their agents and attorneys, be enjoined and restrained *pendente lite* from voluntarily paying said tax alleged to be due on or before June 30, 1910, and from otherwise complying with the provisions of said Section 38 of said act of Congress.

(5) That said defendants, their agents and attorneys, may be perpetually restrained and enjoined as aforesaid.

(6) That your orator may have such other or different relief in the premises as to this Honorable Court may seem meet.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make, to the best and utmost of their knowledge, remembrance, information and belief, but not under oath (an answer under oath being hereby expressly waived) to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were specially interrogated thereunto; may it please your Honors to grant unto your orator a subpœna *ad respondendum* issuing out of and under the seal of this Honorable Court, to be directed to the said defendants, Charles E. Cotting and Charles F. Adams, 2d, Trustees as aforesaid, commanding them and each of them on a day certain and under a certain penalty to be therein inserted to
17 appear before your Honors in this Honorable Court and then and there full, true, direct and perfect answer make to all and singular the premises; and further to perform and abide by such further order and decree as to your Honors shall seem meet; and also a writ of provisional injunction and a writ of perpetual injunction to the same purport and effect as is hereinbefore set forth and prayed.

And your orator, as in duty bound, will ever pray, etc.

CHARLES H. TYLER,
OWEN D. YOUNG,
BURTON E. EAMES,
RANDOLPH FROTHINGHAM,
*Solicitors for Complainant.*

UNITED STATES OF AMERICA,
*District of Massachusetts:*

Charles H. Tyler, being duly sworn, deposes and says: that he is one of the solicitors for the complainant, Maine Baptist Missionary Convention named in the foregoing bill of complaint; that the reason why this verification is not made by said company or by some officer thereof is because they are absent from the State and District of Massachusetts; that deponent has read said bill and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that, as to those matters, he believes it to be true.

CHARLES H. TYLER.

Subscribed and sworn to before me this 8th day of April A. D. 1910.

[SEAL.] RANDOLPH FROTHINGHAM,
*Notary Public.*

18 "EXHIBIT A."

An Agreement and Declaration of Trust, made by the subscribers this twelfth day of February A. D. 1903, for the purpose of purchasing and holding (subject to the purchase money mortgage hereinafter mentioned) a certain parcel of land in Boston, in the County of Suffolk and Commonwealth of Massachusetts, bounded and described as follows, westerly by Washington Street, southerly by Essex Street, easterly by Harrison Avenue Extension, and northerly by Hayward Place, comprising several parcels of land with buildings thereon, containing about 49,750 square feet.

1. The trustees under this agreement are authorized as such trustees to purchase said real estate above described together with any existing encumbrances thereon, and to proceed to erect as soon as practicable upon said land such "building of the first class" as defined by the Building Laws for the city of Boston, not exceeding one hundred feet in height from the mean grade of the land, as in their judgment is suitable for dry-goods and department store business, and to these ends as such trustees to make all necessary contracts and agreements for such purchases, and for such new building and fixtures; and the trustees are further authorized to make, execute, acknowledge and deliver a purchase money power of sale mortgage in the usual form on said land and building, securing an amount not exceeding $3,000,000 for a term not exceeding ten years at a rate of interest not exceeding 4 per centum per annum, or the trustees may, if they deem it desirable so to do, purchase said real estate subject to such a purchase money mortgage, and the trustees may from time to time, and without the vote of the shareholders hereunder, extend, renew or replace said purchase money mortgage in such amounts, not at any time exceeding $3,000,000, and for such terms and at such rates of interest as the trustees then deem desirable. They may also enter

into, execute and deliver, from time to time, such agreements or conveyances as they may deem expedient or advisable for straightening or altering boundary lines; and for the better adjustment of boundary lines, in their discretion, may acquire additional adjoining land; and may for that purpose likewise sell and convey portions of the trust property. The trustees shall take charge of and manage the property from time to time held by them under this agreement as they shall deem for the best interests of the shareholders. Said trustees may make a lease or leases of the property held by them hereunder, or any part thereof, from time to time, upon such terms as they may think best.

After said building is completed the trustees shall incur no debt or liability (except the purchase money mortgage aforesaid or an extension, renewal or replacement of all or a part thereof), except such as may be incidental to the management of the property held by them, and then only for an amount not exceeding in the aggregate at any one time fifty thousand dollars.

The term "the trustees" shall mean the trustees hereunder for the time being, whether original or substituted.

The term "shareholder" used in this agreement shall mean holder of record of a receipt or a certificate from the trustees hereunder.

The trustees shall have no power to bind the shareholders personally. In every written contract they may make reference shall be made to this declaration of trust. The person or corporation contracting with the trustees shall look to the funds and property of the trust for the payment under such contract, or for the payment of any debt, mortgage, judgment or decree, or of any money that may otherwise become due or payable by reason of the failure on the part of said trustees to perform such contract in whole or in part, and neither the trustees nor the shareholders, present or future, shall be personally liable therefor.

2. The trustees shall give receipts for instalments on subscriptions when paid, and on the payment of the last instalment shall issue certificates to the shareholders in exchange for such receipts in shares of one hundred dollars each for each one hundred dollars paid. Such receipts and certificates shall be transferable only on the books of the trustees upon surrender thereof, all instalments due having first been paid, and the acceptance of a receipt or certificate shall make the person named therein a party to this agreement.

3. Interest at the rate of four per cent. per annum shall be added to the cost of the building and paid semi-annually to the shareholders from the date of their respective payments of subscriptions until three months after the substantial completion of said building. All taxes, betterments and assessments levied during the construction of said building shall be added to the cost. The cost of said building shall also include the compensation of the trustees during construction, and also a commission to be paid to Charles W. Whittier & Brother (such commission to be one per centum on the amount of subscriptions hereto and the amount of any purchase money mortgage
19 or mortgages and one per centum on the gross amount of the rentals of any lease or leases negotiated by them) for their

services and expenses in promoting this enterprise and procuring subscriptions to this agreement, including the negotiation of the purchase money mortgage or mortgages, and of the first lease of said estate.

The cost of said building shall also include the cost (including underwriting) of obtaining the entire funds required whether represented by mortgage or other indebtedness, or on subscriptions hereto, but the cost of obtaining such funds shall not exceed five per centum of the total amount of such fund obtained.

4. The trustees hereunder shall be allowed their reasonable expenses incurred in the execution of the trust; and shall receive in full as their compensation for services, after the completion of the building, five (5) per centum per annum upon the gross amounts of all income collected by them, and also a reasonable compensation for their services rendered during construction; and they are authorized, if in their discretion it seems wise, to pay the customary commission to real estate brokers for furnishing tenants from time to time.

5. After three months from the completion of the new building, the trustees shall make such dividends as they may from time to time deem expedient to the shareholders.

6. The trustees shall call meetings of the shareholders annually, on the third Wednesday of March, and shall report their receipts and expenses for the year ending on the first of March preceding; the first annual meeting, however, to be called on the third Wednesday of March A. D. 1904. They may call special meetings of the shareholders at any time, and shall do so upon the written request of the holders of one-twentieth of the shares.

7. Notices of meetings shall be given seven days beforehand, and may be given by advertisement for three successive days in two daily papers published in said Boston, or by mail, at the option of the trustees. In notices of special meetings the purpose thereof shall be stated.

Notices of meetings, or calls for payments of subscriptions, or for any other purpose, shall be deemed binding upon each subscriber and shareholder if mailed postage prepaid to the address last given by him to the trustees, or, in default thereof, to his last known place of business or abode.

8. Shareholders may vote by proxy.

At any annual meeting, or special meeting called for the purpose, the holders of a majority of the entire number of shares may fill any vacancy existing in the number of trustees; may depose any or all of the trustees and elect others in their place; may authorize the sale or mortgage (other than the purchase money mortgage hereinbefore referred to or any extension, renewal or replacement theeof) of the property or any part thereof held by the said trustees; and may alter or amend this agreement. For all other purposes a majority of those shareholders present may decide on matters properly coming before them. At any meeting five shareholders or their proxies, representing one-fifth of all the shares, shall constitute a quorum.

No such alteration or amendment of this agreement nor change

of trustee or trustees shall affect any person not having actual notice thereof until recorded in the Registry of Deeds for Suffolk County, Massachusetts, nor shall any such alteration or amendment, or other action, affect previously-acquired rights of any third person.

A certificate signed by the acting trustees or trustee shall be conclusive evidence of the regularity of any meeting and of any vote passed at such meeting, and of all facts stated in such vote or certificate.

9. Any vacancy in the number of trustees may be filled by the remaining trustee until the next annual meeting of the shareholders, or special meeting called for the purpose of filling such vacancy. The acting trustee or trustees from time to time shall have all the powers of original trustees. Upon resignation, decease, incapacity or removal or vacancy for any cause, the title of the outgoing trustee shall vest in the remaining trustee, and upon the filling of any vacancy by the shareholders, as aforesaid, the title of the whole trust property shall vest in the new trustees jointly.

10. The trustees may sell all the trust property at the expiration of the trust in default of action relative thereto by the shareholders, without any vote of or further reference to the shareholders hereunder.

11. This trust shall continue until the expiration of twenty years after the death of the last survivor of the following named persons, to wit: all the subscribers hereto, and Sedgwick Minot, son of William Minot; Edward S. Welch, Charles A. Welch, 3d, sons of Francis C. Welch; Francis M. Rackemann, son of Felix Rackemann; Charles E. Cotting, Jr., son of Charles E. Cotting; Gannett Wells, son of Samuel Wells; Reginald Boardman, son of T. Dennie Boardman; and James Jackson, son of James Jackson. The trustees shall each be liable only for his own acts, and then only for wilful breach of trust.

12. Any certificate or paper signed by the trustees or any of them, or by the shareholders, or a copy of the record of any of their proceedings certified by any one of the trustees, which it may be deemed desirable to record in the Registry of Deeds for the County of Suffolk, may be acknowledged by any one of the trustees or parties signing in the manner from time to time prescribed by law for the acknowledgment of deeds in Massachusetts.

13. We, the subscribers, agree to pay to the trustees the amounts set against our names, in such sums and at such times as the trustees may require, and in case any subscriber neglects to pay any instalment required by the trustees in twenty days after notice, the amount of his subscription then unpaid may be cancelled at the option of the trustees who may accept another subscriber in his place, and payments already made shall be forfeited.

14. The limit of subscription hereto shall be not exceeding the sum of $4,000,000, and no subscription shall be binding until the total amount subscribed is $3,000,000.

15. The first trustees, hereinbefore called trustees, under this agreement, shall be Charles E. Cotting and Francis C. Welch, both of said Boston, who signify their acceptance of the trust by subscrib-

ing their names hereto. No bond or surety or sureties shall ever be required of any trustee acting hereunder.

In witness whereof, said subscribers and said trustees hereto set their hands and common seal, each adopting the seal hereto affixed, on the day and year first above written.

.....
.....
*Trustees.*

| Name. | Amount. | Name. | Amount. |
|---|---|---|---|
| | | | |

21 "EXHIBIT B."

Number —. Shares. —.

*Department Store Trust.*

This Certifies that —— —— of —— the owner of —— Shares under the trusts of Indenture between the undersigned and others relating to real estate situated on Washington and Essex Streets, Harrison Avenue Extension and Hayward Place, in Boston and dated February 12th, 1903, recorded with Suffolk Deeds Libro 2924 folio 274 this Certificate being transferable only in accordance with the provisions of said Indenture and by transfer upon the books of the Trustees and a surrender of this Certificate.

In Witness Whereof the Trustees set their names at Boston this —— —, —.

OLD COLONY TRUST COMPANY,
*Transfer Agent,*
By —— ——, *Assistant Secretary,*
—— ——, *Transfer Clerk.*

—— ——,
—— ——,
*Trustees under said Indenture.*

[On left margin:] Registered. International Trust Company, Registrar, By —— ——, Secretary.

[On right margin:] This Certificate must be signed by the Transfer Agent and Registrar.

22 NOTICE.—The signature to this Assignment must correspond with the name as written upon the face of the Certificate in every particular, without alteration or enlargement, or any change whatever.

23 On the same day, the following Defendants' Demurrer is filed:

*Defendants' Demurrer.*

(Filed April 8, 1910.)

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to said bill and for causes of demurrer show—

*First.* That said bill doth not contain any matter of equity whereon said Court can ground any decree or give to the complainant any relief against these defendants or either of them.

*Second.* That it appeareth by the complainant's own showing by said bill that it is not entitled to the relief prayed for therein against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants separately and severally demur thereto and pray the judgment of this Honorable Court, whether they or either of them shall be compelled to make any an-
24 swer to said bill, and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

H. HUESTIS NEWTON,
*Solicitor for Defendants.*

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

H. HUESTIS NEWTON,
*Solicitor for Defendants.*

UNITED STATES OF AMERICA,
*For the District of Massachusetts:*

I, Charles E. Cotting, being duly sworn, depose and say: I am one of the above named defendants. The foregoing demurrer is not interposed for purpose of delay.

CHAS. E. COTTING.

Sworn to before me this 8th day of April, 1910.

[SEAL.] ARTHUR N. MADDISON,
*Notary Public.*

25 Also on the same day, this cause is set down for hearing on demurrer and fully heard by the Court, the Honorable Edgar Aldrich, District Judge for the District of New Hampshire, duly assigned to hold said Circuit Court, sitting, said demurrer being sustained by the Court.

Also on the same day, the following Final Decree is entered:

*Final Decree.*

April 8, 1910.

ALDRICH, *J.:*

This cause having come on to be heard upon the bill and the demurrer thereto, it is hereby

Ordered and decreed that the said demurrer be sustained and that the bill of complaint above named be and the same is hereby dismissed with costs.

By the Court:

CHARLES K. DARLING, *Clerk.*

A true record.

Attest:

CHARLES K. DARLING, *Clerk.*

*Judge's Certificate on Claim for Appeal.*

Thereupon the above named complainant states that in this case, the interpretation and constitutionality of a law of the United States is drawn in question, and in open court prays an appeal from said final decree direct to the Supreme Court of the United States, pursuant to the statute in such case made and provided. It is,
27 therefore, further ordered that the said appeal be, and the same is, hereby allowed as prayed for in open court.

The said defendants then admitted in open court due notice of the said appeal, and duly waived service of any citation thereon.

EDGAR ALDRICH,
*United States Dist. Judge, Presiding.*

28 *Assignment of Errors.*

(Filed April 8, 1910.)

And now comes the complainant in the above entitled cause and in connection with its petition of appeal from the final decree made and entered herein on the eighth day of April, 1910, dismissing the complainant's bill of complaint with costs, makes this the following assignment of errors in pursuance of the statute and rule in such case made and provided.

(1) The Court erred in deciding that section 38 of the act of Congress entitled "An act to provide revenue, equalize duties
29 and encourage the industries of the United States and for other purposes" approved August 5, 1909, is applicable to said Department Store Trust or to the defendants as Trustees thereof or that such trusts or any similarly constituted were intended by Congress to be included within the scope or effect of said section.

(2) The Court erred in deciding that said Department Store Trust

or the defendants as Trustees thereof were carrying on or doing business within the meaning of said section 38 of said act of Congress and that therefore said Department Store Trust or the defendants as Trustees thereof were within the scope and effect of said section.

(3) The Court erred in deciding that the tax imposed by said section 38 of said act of Congress is not a direct tax and therefore although not apportioned among the states, is constitutional and valid, thereby violating the requirements of the constitution of the United States and particularly of sections 2 and 9 of Article I thereof to the effect that no direct tax shall be levied unless apportioned.

(4) The Court erred in deciding that the tax imposed by said section 38 of said act of Congress is not, as applied to said Department Store Trust or the defendants as Trustees thereof, a direct tax and therefore, although not apportioned among the states, is constitutional and valid, thereby violating the requirements of the constitution of the United States and particularly of sections 2 and 9 of Article I thereof to the effect that no direct tax shall be levied unless apportioned.

(5) The Court erred in deciding that the provisions of said section 38 requiring the preparation and filing of returns and con-
30 stituting the same public records, in destroying the privacy of the business affairs of the defendants as Trustees of said Department Store Trust, did not involve depriving said defendants and said trust of their property without due process of law or a taking of their property for public use without just compensation in violation of the constitution of the United States and particularly of the Fifth Amendment thereto.

(6) The Court erred in deciding that the provisions of said section 38 of said act of Congress requiring the preparation and filing of returns and constituting the same public records and requiring payment of a tax equivalent to one per centum upon the entire net income over and above Five Thousand Dollars ($5000) received from all sources during each year, does not involve depriving said trust and the defendants as Trustees thereof of their property without due process of law and a taking of their property for public use without just compensation in violation of the constitution of the United States and particularly of the Fifth Amendment thereto.

(7) The Court erred in deciding that the provisions of said section 38 as applied to said Department Store Trust or the defendants as Trustees thereof or the *cestuis que trustent* thereunder, do not involve depriving said parties in interest therein of their property without due process of law or the taking of their property for public use without just compensation in violation of the constitution of the United States and particularly of the Fifth Amendment thereto.

(8) The Court erred in deciding that the provisions of said section 38 as applied to said Department Store Trust or the de-
31 fendants as Trustees thereof or the *cestuis que trustent* thereunder do not involve the depriving of said parties in interest therein of their respective rights to act as Trustees and *cestuis que trustent* and as such to deal with property, to own and lease the same

and to receive the rents and income thereof, in violation of the constitution of the United States and particularly of the Fifth Amendment thereto.

(9) The Court erred in deciding that the provisions of said section 38 as applied to said Department Store Trust or the defendants as Trustees thereof or the *cestuis que trustent* thereunder, although the same are not applicable to individuals or co-partnerships, nevertheless do not involve the depriving of the parties in interest therein of their property without due process of law, in violation of the Constitution of the United States and particularly of the Fifth Amendment thereto.

(10) The Court erred in deciding that the tax imposed by said section 38 as applied to said Department Store Trust and the defendants as Trustees thereof, although such tax is not imposed upon individuals acting or holding property other than in a trust capacity nevertheless does not involve arbitrary or unreasonable classification, in violation of the Constitution of the United States and particularly of the inherent conditions and requirements in the grant of the taxing power to Congress, and does not deprive said trust estate and the parties interested therein of liberty and property without due process of law, in violation of the Constitution of the United States and particularly of the Fifth Amendment thereto.

(11) The Court erred in deciding that the tax imposed by said section 38 as applied to said Department Store Trust and the defendants as Trustees thereof, although such tax is not imposed upon Trusts existing under wills or under agreements or declara-
32 tions of trust in which the beneficial interest, irrespective of the number of beneficiaries thereunder, is not represented by certificates nevertheless does not involve arbitrary or unreasonable classification, in violation of the Constitution of the United States and particularly of the inherent conditions and requirements in the grant of the taxing power to Congress and does not deprive said trust estate and the parties interested therein of liberty and property without due process of law in violation of the Constitution of the United States and particularly of the Fifth Amendment thereto.

(12) The Court erred in deciding that the provisions of said section 38 requiring the preparation and filing of returns are a proper exercise of power granted the Congress of the United States and are not in excess of the power so delegated, in violation of the constitution of the United States and particularly of the Tenth Amendment thereto.

(13) The Court erred in deciding that the provisions of said section 38 are a proper exercise of power granted the Congress of the United States and are not in excess of the power so delegated, in violation of the constitution of the United States and particularly of the Tenth Amendment thereto.

(14) The Court erred in deciding that said section 38 is not unconstitutional and void and in holding the same constitutional and valid.

(15) The Court erred in sustaining the demurrer to said bill of complaint.

(16) The Court erred in dismissing the said bill of complaint with costs.

CHARLES H. TYLER,
OWEN D. YOUNG,
BURTON E. EAMES,
RANDOLPH FROTHINGHAM,
*Solicitors for Complainant.*

Dated, Boston, Massachusetts, April 8th, 1910.

Approved,
EDGAR ALDRICH,
*United States District Judge, Presiding.*

33 *Bond on Appeal.*

(Filed and Approved April 8, 1910.)

Know all Men by these Presents, That we, Maine Baptist Missionary Convention, a corporation organized and existing under the laws of the State of Maine, as principal, and American Bonding Company of Baltimore, a corporation organized under the laws of the State of Maryland, and having a usual place of business in Boston, in the County of Suffolk and Commonwealth of Massachusetts, as surety, are held and firmly bound unto Charles E. Cotting and Charles F. Adams, 2nd, as they are Trustees under an agreement and declaration of trust dated February 12, 1903 and recorded in the Registry of Deeds for the County of Suffolk and Commonwealth of Massachusetts, Book 2924, page 274 in the full and just sum of two hundred and fifty dollars ($250) to be paid to the said Charles E. Cotting and Charles F. Adams 2nd, Trustees as aforesaid, their certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of April in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Circuit Court of the United States for the District of Massachusetts in a suit in Equity depending in said Court between Maine Baptist Missionary Convention, complainant, and Charles E. Cotting and Charles F. Adams, 2nd, Trustees as aforesaid, defendants a decree was entered against the said Maine Baptist Missionary Convention and the said Maine Baptist Missionary Convention having obtained an appeal to remove said cause to the Supreme Court of the United States, to reverse the decree in the aforesaid suit, and a citation directed to the said Charles E. Cotting and Charles F. Adams, 2nd, Trustees as aforesaid citing and admonishing them to be and appear in the said Supreme Court of the United States, in the city of Washington, in the District of Columbia, on the eleventh day of April, A. D. 1910.

Now, the condition of the above obligation is such, That if the said Maine Baptist Missionary Convention shall prosecute its appeal to

effect, and answer all damages and costs if it fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

MAINE BAPTIST MISSIONARY CONVENTION, [SEAL.]
By C. H. TYLER, *Its Solicitor.*
AMERICAN BONDING COMPANY OF BALTIMORE, [SEAL.]
By BERTRAM G. WATERS, *Vice Pres't.*
Attest: A. A. DORITY, *Ass't Sec'y*

Sealed and delivered in presence of

——— ———.
——— ———.
——— ———.

Approved:
EDGAR ALDRICH,
*U. S. Dist. Judge Presiding.*

34 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Charles E. Cotting, of Boston, in the County of Suffolk, and Charles F. Adams, 2d, of Concord, in the County of Middlesex, both in the Commonwealth of Massachusetts, trustees under an agreement and declaration of trust, dated February 12, 1903, and recorded in the registry of deeds for the County of Suffolk, in said Commonwealth, book 2924, page 274, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the* eleventh day of April next, pursuant to an Appeal duly obtained from a decree of the† Circuit Court of the United States for the District of Massachusetts wherein Maine Baptist Missionary Convention, a corporation duly organized and existing under the laws of the State of Maine, and having a usual place of business in the city of Portland, in the State of Maine, is appellant and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edgar Aldrich, Judge of the District Court of the United States for the District of New Hampshire duly assigned to hold said Circuit Court, this eighth day of April, in the year of our Lord one thousand nine hundred and ten.

EDGAR ALDRICH,
*U. S. District Judge Presiding.*

*Not exceeding 30 days from the day of signing.
†Name of Court in which the Decree is entered.

35 *Acknowledgment of Service on Citation on Appeal.*

APRIL 8, 1910.

Full, due, complete and sufficient service of the within citation is hereby accepted and acknowledged.

H. HUESTES NEWTON,
*Attorney for Defendants.*

Boston, Mass.

36 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
*District of Massachusetts, ss:*

I, Charles K. Darling, Clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the foregoing is a true copy of the record and all proceedings in the cause in equity entitled, No. 705, Maine Baptist Missionary Convention, Complainant, v. Charles E. Cotting, et al., Trustees, Defendants, in said Circuit Court determined, Judge's Certificate on Claim for Appeal, the Assignment of Errors, the Bond on Appeal, and also the original Citation issued upon the appeal of the complainant in said cause, with the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said District, this eighth day of April, A. D. 1910.

[Seal of the Circuit Court, Massachusetts.]

CHARLES K. DARLING, *Clerk.*

Endorsed on cover: File No. 22,095. Massachusetts C. C. U. S. Term No. 869. Maine Baptist Missionary Convention, appellant, vs. Charles E. Cotting and Charles F. Adams, 2d, trustees, &c. Filed April 9th, 1910. File No. 22,095.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

**No.**

AMORY ELIOT, APPELLANT,

v.

JAMES G. FREEMAN ET AL., APPELLEES.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

## MOTION TO ADVANCE UNDER RULE 26.

*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

I.

In this case the constitutionality of the corporation tax (Section 38 of the Act approved August 5, 1909) is drawn in question. *Flint* v. *The Stone Tracy Co. et al.*, No. 747, and several other cases, intended as test cases, have been advanced for hearing on March 14, 1910. We respectfully ask to have this case advanced and heard with them.

II.

All the other cases are corporation cases. None of them is brought against a voluntary association or joint stock

company. This case is brought against a concern of a kind common in Boston. Many million dollars worth of real and personal property are owned by such concerns and collectively they have a large income. The deputy collector at Boston has sent them blanks asserting that they are subject to the tax as "associations".

III.

The case raises questions wholly different in character from those which are raised in the cases against corporations. These questions will also present very great difficulties for those who contend that the tax is constitutional. It may well be that the entire tax will fail because of the difficulties which are best illustrated in this case. On the other hand, the tax may be sustained as to corporations and declared void when applied to associations or to such concerns as that involved in this suit. The results of the other test cases will not necessarily decide this case.

IV.

We respectfully submit that it is only fair to give voluntary associations and concerns their day in court before the court passes on the law as a whole, in order that they may not be precluded or prejudiced by a decision of the other cases made without full presentation of the difficulties in this case.

V.

The complainant is one of the beneficiaries of "The Cushing Real Estate Trust", a concern owning valuable real estate in Boston, of which the respondents are the trustees. This suit is brought to restrain the threatened voluntary compliance by the trustees with the provisions of said act, on the ground that such compliance would be a breach of trust both in disclosing the private affairs of the trust and in diverting the trust funds to the tax. The

Circuit Court had jurisdiction of the cause as one arising under a law of the United States providing for internal revenue.

The complainant claims that said act does not apply to the respondents or the trust property and that said act, if so applicable, violates Sections 2, 7, 8 and 9 of Article I and Amendments IV, V and X of the Constitution of the United States.

VI.

The case was heard in the Circuit Court of the United States for the District of Massachusetts upon bill and demurrer. The demurrer being sustained appeal direct to this Court was prayed and allowed.

VII.

The appellant therefore prays that the case may be advanced upon the docket and heard with the Flint and other cases on March 14th next, or at as early a day as may be convenient to the court. Notice of this motion has been served on counsel for the appellees and proof of service filed with the Clerk of this Court. Notice has likewise been given to the Attorney General and to the Solicitor General.

Respectfully submitted,

JOHN W. YERKES,
RICHARD W. HALE,
*Counsel for Appellant.*

Washington, D. C., February 18, 1910.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

**No. 802.**

AMORY ELIOT, APPELLANT,
v.
JAMES G. FREEMAN ET AL., APPELLEES.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

## MOTION TO ADVANCE UNDER RULE 26.

*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

I.

In this case the constitutionality of the corporation tax (Section 38 of the Act approved August 5, 1909) is drawn in question. *Flint* v. *The Stone Tracey Co. et al.*, No. 747, and several other cases, intended as test cases, were advanced and heard in the week of March 14, 1910. We respectfully ask to have this case advanced on the ground that it is a test case applying to a class of concerns, large in number and value, which were not represented at the previous hearing, although an argument was made against them by the Attorney General in his brief.

II.

All the other cases are corporation cases. None of them is brought against a voluntary association or joint stock company. This case is brought against a concern of a kind common in Boston. Many million dollars worth of real and personal property are owned by such concerns and collectively they have a large income. The deputy collector at Boston has sent them blanks asserting that they are subject to the tax as "associations", and on ~~April~~ March 31, 1910, the Attorney General transmitted to the Treasury Department a ruling that they are subject to the tax.

III.

The case raises questions wholly different in character from those which are raised in the cases against corporations; questions which will present very great difficulties for those who contend that the tax is constitutional. It may well be that the entire tax will fail because of the difficulties which are best illustrated in this case. On the other hand, the tax may be sustained as to corporations and declared void when applied to associations or to such concerns as that involved in this suit. The results of the other test cases will not necessarily decide this case.

IV.

We respectfully submit that it is only fair to give voluntary associations and concerns their day in court before the court passes on the law as a whole, in order that they may not be precluded or prejudiced by a decision of the other cases made without full presentation of the difficulties in this case.

V.

The complainant is one of the beneficiaries of "The Cushing Real Estate Trust", a concern owning valuable real estate in Boston, of which the respondents are the

trustees. This suit is brought to restrain the threatened voluntary compliance by the trustees with the provisions of said act, on the ground that such compliance would be a breach of trust both in disclosing the private affairs of the trust and in divertiug the trust funds to the tax. The Circuit Court had jurisdiction of the cause as one arising under a law of the United States providing for internal revenue.

The complainant claims that said act does not apply to the respondents or the trust property and that said act, if so applicable, violates Sections 2, 7, 8 and 9 of Article I and Amendments IV, V and X of the Constitution of the United States.

VI.

The case was heard in the Circuit Court of the United States for the District of Massachusetts upon bill and demurrer. The demurrer being sustained, appeal direct to this Court was prayed and allowed.

A motion to advance was then filed in this Court and notice of motion given to the adverse party and to the Attorney General and to the Solicitor General for a hearing of that motion to advance on February 21st, the same day when the majority of the other test cases were advanced. On the morning of that day, after a conference with the Solicitor General it seemed proper to await a ruling from the office of the Attorney General on applications which had been made by various parties in regard to these real estate trusts. The ruling having been made and being adverse to our contention, we now ask for a day in Court.

We especially call the attention of the Court to the fact that the Attorney General had been so far informed of our contentions by the pendency of this record and of the application for rulings that he argued the case against such concerns as that involved in this case when he argued the main case. On the other side all counsel represented corporations. Unless this case is advanced, therefore, our clients

stand in the position of not having an opportunity to argue their case when an argument against it has reached the eyes and ears of this Court, and a very serious aspect of the act which may affect the validity of the whole Act will not have been fully presented.

VII.

The appellant therefore prays that the case may be advanced upon the docket and heard at as early a day as may be convenient to the court before the court passes upon the act as a whole.

While we respectfully submit that it would be only fair to give our clients an opportunity for oral argument, yet the matter is of such vital importance that we should waive in behalf of our clients any part of our contention to be heard orally, provided that the court makes that a condition of advancing the case or receiving briefs before the decision of the cases heretofore argued under the act.

Notice of this motion has been served on counsel for the appellees and proof of service filed with the Clerk of this Court. Notice has likewise been given to the Attorney General and to the Solicitor General.

Respectfully submitted,

MOORFIELD STOREY,
JOHN W. YERKES,
RICHARD W. HALE,
FRANK W. GRINNELL,
*of Counsel.*

April 6, 1910.

# Supreme Court of the United States.

OCTOBER TERM, 1910.

**No. 448.**

AMORY ELIOT, APPELLANT,

v.

JAMES G. FREEMAN ET AL., APPELLEES.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

## MOTION TO REASSIGN.

*To the Honorable the Justices of the Supreme Court of the United States:*

I.

This is the first test case under the Corporation Tax Act in which a *corporation* is *not* involved.

On the motion of the appellant, the case was advanced on April 18th, 1910, and assigned for hearing on October 11th, 1910. Thereafter the Court ordered all the corporation tax cases which were argued in March to be restored to the docket for reargument before a full court and the date for such reargument has not yet been assigned. Since the assignment the sad death has occurred of Solicitor General Bowers, who had charge of this case for the Government.

After consultation with the Department of Justice and, as we understand, with the approval of the Department, we respectfully ask to have this case postponed and reassigned

to be the next case after the reargument of the other corporation tax cases above mentioned at whatever date the Court may hereafter assign those cases for reargument. We understand that the Department approves of and desires both the postponement and the separate argument directly after the other corporation cases, but not as one case with them.

II.

Our reasons for this motion are:

*First.* That as the Court has ordered a reargument of the other cases before a full court, the Court will probably prefer to have this case also heard by a full court, as it presents different aspects of the same statute involved in the other cases.

*Second.* As the statute deals primarily with corporations, and there are fifteen cases already before the Court concerning different kinds of corporations, it seems probable that the Court will prefer to hear the full presentation of those cases and then proceed to hear the argument relating to the persons who are not incorporated, but whom the Government is seeking to tax under the act by the words "Joint stock companies and associations".

*Third.* The fifteen corporation tax cases which have been ordered for reargument were advanced and heard last March as one case. We respectfully ask to have this case set for hearing as the next case after those cases, but not as one case with them, because the case raises questions wholly different in character from those which are raised in the cases against corporations. It may well be that the entire tax will fail because of the difficulties which are best illustrated in this case. On the other hand, the tax may be sustained as to corporations and declared void when applied to associations or such persons as those involved in this suit. The results of the other test cases will not necessarily decide this case.

III.

As stated in our motion to advance, the defendants in this suit hold their real estate on trusts of a kind common in Boston. Many million of dollars worth of real and personal property are owned upon such trusts by many different trustees and collectively they have a large income. In bringing this test case counsel herein represent, besides the appellant, persons interested under fifty or sixty similar declarations of trust created for various purposes to whom it is important that their status should be considered by the Court before the Court passes on the Corporation Tax Law as a whole, in order that they may not be precluded or prejudiced by a decision of the other cases made without full presentation of their case.

IV.

The appellant, therefore, prays that the assignment for October 11th be cancelled and that the case be reassigned to be heard as the next case after the reargument of the other corporation tax cases at such time as the Court may hereafter assign for such reargument or at such time as may be convenient for the Court.

Notice of this motion has been served on counsel for the appellees and proof of service filed with the clerk of this Court.

Notice has likewise been given to the Attorney General.

MOORFIELD STOREY,
RICHARD W. HALE,
FRANK W. GRINNELL,
*of Counsel.*

Supreme Court U. S.
FILED
JAN 17 1911
JAMES H. McKENNEY,
Clerk.

# Supreme Court of the United States.

October Term, 1910.

No. 446.

AMORY ELIOT, Appellant,

v.

JAMES G. FREEMAN, ROBERT A. BOIT, NATHANIEL THAYER, and ROBERT H. GARDINER, Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR APPELLANT.

[redacted]

# Supreme Court of the United States.

October Term, 1910.

No. 448.

AMORY ELIOT, Appellant,

v.

JAMES G. FREEMAN, ROBERT A. BOIT, NATHANIEL THAYER, and ROBERT H. GARDINER, Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

## Brief for Appellant.

### STATEMENT OF FACTS.

This is the first test case under the "Corporation Tax Act" in which a *corporation* is *not* involved.

The appellant, Amory Eliot, owning an interest as *cestui que trust* in real estate held by the appellees under the trust agreement of which a copy is printed in the record (p. 9), brought his bill in equity to restrain the appellees from diverting the property of the trust by making a return of their fiduciary affairs and from paying any tax assessed upon them under section 38 of the Act of Congress approved August 5, 1909, known as "The Corporation Tax Act." The prayer of the bill

is that the respondents be enjoined from making any return and paying any tax, and, in case they do either *pendente lite*, that they be required to reimburse the trust for all expense, loss, and damage caused by such acts. (*Record*, p. 8, pars. 3, 4.) There is also a prayer that they be instructed as to their duty in the premises. (*Record*, p. 8, par. 5.) The Court sustained a demurrer to the bill, and from this decree the complainant appealed to this Court.

The facts may be stated briefly as follows: —

For a number of years before March 2, 1903, the two parcels of real estate described in the trust agreement were owned by several persons, each of them owning a fractional undivided interest, and the property was managed for them by an agent. While this condition of things continued any owner of the property might convey his interest by proper instrument in writing. This method of managing the property, however, was attended with inconveniences, especially when the owner of any undivided share died, and therefore, on March 2, the owners conveyed the property to the respondents in fee with all the rights and powers of owners. As such they have managed the property and collected the rents. Their entire income consists of these rents and a trifling sum allowed as interest by the banks in which the rents are temporarily deposited.

When the conveyance was made to the respondents they executed the trust agreement, whereby they agreed that they would manage the property, pay the expenses, and, after making proper reservations for contingencies, would divide the balance of the income among the persons who conveyed the property to them according to their respective interests, and that twenty

years after the termination of a life or lives in being they would sell the property and divide the proceeds among the parties interested. The owners who conveyed the property valued it at $480,000, and the defendants issued to them certificates for this sum in the aggregate, divided into shares of $100 each, every owner receiving a number of shares equal to the value of the interest which he conveyed. This was a convenient way of reducing the various fractional interests in the estate, as, for example, 1/8, 1/12, or 2/15, to fractions with a common denominator, and these interests were made transferable by an assignment of the certificates, instead of by a deed as before, the transferee in either case acquiring all the rights of the original owner. The trustees have power to sell any of the estate, and to buy other real estate, but this power has never been exercised.

No holder of a certificate has any right to partition (*Record*, p. 13, sec. 8, last paragraph). The agreement also contains provisions for changing the trustees and amending or terminating the trust (*Record*, p. 10, sec. 2, pp. 13, 14, sec. 10).

In law, as between the government and the taxpayer, we have four individuals owning real estate and collecting the rentals. *This is the only thing from which they derive income.* If they are taxable it is on these facts, for the rights of the government depend on the receipt of income, and are in no way affected by the manner in which it is spent. If this law is valid, the income of a corporation is equally taxable whether it is paid out in dividends, in acquiring or improving property, or in paying debts.

If we look through the legal position of the trustees

to the substance of the transaction, we find that the owners still hold their property in undivided shares, and manage it through agents, who collect the income, pay the expenses, and divide the balance among the owners.

The questions are whether the trustees are an association liable to taxation within the meaning of the act in question, and, if so, whether Congress has the power to impose a tax upon their income.

As stated in our motion to advance, the defendants in this suit hold their real estate on trusts of a kind common in Boston. Property worth millions of dollars is held upon such trusts by many different trustees, and collectively they have a large income. In bringing this test case, counsel herein represent, besides the appellant, persons interested under fifty or sixty similar declarations of trust to whom it is important that the status of trustees under such declarations should be considered by the Court before the Court passes on the Corporation Tax Law as a whole, in order that they may not be prejudiced by a decision of the other cases made without full presentation of this case.

## ASSIGNMENT OF ERRORS.

The Court below erred, —

*First.* In sustaining the demurrer of the defendants.

*Second.* In not holding that the Act does not subject the defendant trustees or the property held in trust by them to taxation.

*Third.* In not holding that the Corporation Tax Law is unconstitutional if it subjects the defendant trustees or the trust property to taxation.

The appellant contends, —

(1) That the respondent trustees are not taxable under the act because, —

A. There is no "carrying on or doing business" by them which can be made the subject of an excise tax;
B. There is no "joint-stock company or association;"
C. There is no organization "for profit;"
D. There is no "capital stock represented by shares;"
E. There is no association "*organized under the laws*" of any state or country.

(2) That if the act imposes any tax upon the income which the trustees derive from the real estate which they hold, it is unconstitutional as against them.

## ARGUMENT.

### I.

### The Respondent Trustees are not Taxable under the Act.

**A. The respondents are not "carrying on or doing business."**

*First.* This was decided by this Court in —

*Pollock* v. *Farmers Loan & Trust Co.*, 157 U.S. 429.
*Same* v. *Same*, 158 U.S. 601.

These decisions were made under the Act of 1894, and for purposes of comparison the language of that Act and the language of the Act now in question are printed in parallel columns, leaving out non-essential words:

| 1894. | 1909. |
| --- | --- |
| "There shall be . . . collected a tax of two per centum annually on the net profit or income . . . of all . . . corporations, companies or associations *doing business for profit* in the United States no matter how created or organized." | "Every corporation joint stock company or association *organized for profit* and having a capital stock represented by shares shall be subject to pay annually a special excise tax with respect to the *carrying on or doing business* by such corporation, &c . . . equivalent to one per centum upon the entire net income." |

There is no distinction in meaning between the words in the two Acts, and that which is not business under the first is not business under the second.

At the first argument of the Pollock case, though the Court stood equally divided upon many of the questions presented, it held (only two justices dissenting) that a corporation with a large capital, and doing a business resulting in a large income derived from various sources, could not be taxed on the income of real estate which it held and managed as trustee.

*Pollock* v. *Farmers Loan & Trust Co.*, 157 U.S. 429, at page 586.

The exact scope of the income tax decisions was clearly stated by Chief Justice WHITE in *Knowlton* v. *Moore*, 178 U.S. at page 82, as follows: —

> "two things were decided by the court: First, that no sound distinction existed between a tax

levied on a person solely because of his general ownership of real property and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property real or personal, was the legal equivalent of a direct tax on the property from which said income was derived and hence must be apportioned."

See also opinion of FULLER, C.J., 158 U.S. at pages 627, 628.

In the opinion on rehearing of the income tax cases in 158 U.S. p. 601, Chief Justice FULLER limited the decision as follows: —

"We have considered the act only in respect of the tax on income derived from real estate and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments."

The chief justice thus expressly excluded from the scope of the decision the question whether a corporation could be taxed on "gains or *profits from business,*" and as the trust company was held not taxable on income derived from the estate which it held and managed as trustee, this was a decision that such holding and management were not a business. The distinction between ownership and business was and is recognized and enforced.

See *Spreckels Sugar Refining Co.* v. *McLain,* 192 U.S. at pages 413, 417.

*Second.* The same conclusion is reached if we interpret the words of the statute practically.

An individual who owns real estate, shares and bonds, and collects the rentals of the first and the income of the second, is not carrying on business within any proper meaning of the words. In common parlance, a man is said "to retire from business" when, having accumulated sufficient property, he devotes himself to managing it and receiving the income.

The argument may be put in successive steps. The individual owner of real estate who manages it and receives the income is, under the Pollock case, exempt from tax on that income.

If the individual owner dies and his four children, inheriting his property, continue, either personally or by an agent, to manage the property, collect the rents, and divide them, are they, in doing what he did, "carrying on a business," when he was not? If acts inseparable from ownership are not a business when done by one, the same acts are not a business when done by four.

If the owner, instead of dying intestate, leaves his property by will to a trustee in trust to hold and manage the property, to collect and divide the income, and within the period of perpetuity to sell the property and divide the proceeds among the testator's heirs, the trustee steps into the owner's shoes, and manages the property as the owner did. The nature of the work is in no way changed by the change in the person who does it.

If the heirs, instead of appointing an agent, call him a trustee, and for convenience convey the property to him, taking back the evidence of their respective

interests in the form of transferable certificates showing in each an ownership of so many fractional parts of the property, instead of holding it as tenants in common and letting the same interests be shown and transferred by deed, does the work of the trustee in managing the property and collecting the rents become a business?

The ownership of real estate protected by the Constitution is a practical right. The property may be owned and managed in the same way by one individual, by partners, by a testamentary trustee or trustees, or by a trustee or trustees under a trust *inter vivos*, as in this case. In any case the owner is "busy" about his ownership in the colloquial sense, but in no legal sense is he "engaged in business."

> *Smith* v. *Anderson*, L.R. 15 Ch. D. 247, at page 276.

The owner of real estate, because he *is* the owner, manages the property, deals with his tenants, and collects his rents. The right to do these things *is* ownership, and if Congress has no power to tax either the land or the income, except under the rule of apportionment, is it possible that Congress can create that power by calling these acts of the owner "a business," and by calling this direct tax, which it has no power to impose, an "excise" tax? Can words, which in no respect change what is done, which affect no one and deceive no one, repeal an express prohibition of the Constitution? If words can alter it so easily the Constitution is little better than waste paper. A direct tax and an excise tax differ in their essence, and this difference is not obliterated by misnaming either. However broad a

meaning may be given to the phrase "excise tax" it does not include a direct tax.

> *Thomas* v. *United States*, 192 U.S. 363, 370.
> *Patten* v. *Brady*, 184 U.S. pp. 617, 618.
> *Scholey* v. *Rew*, 23 Wall. 348.

No court of equity would permit any individual to evade the obligations of his contract by any such transparent device as the government relies on in this case, and surely no more liberal rule should be adopted in construing the Constitution and determining whether the Congress of the United States has disregarded the great restrictions imposed by that instrument.

In *Galveston Railway Co.* v. *Texas*, 210 U.S. 217, Mr. Justice HOLMES said, —

> "Neither the state courts nor the legislatures by giving the tax a particular name or by the use of some form of words can take away our duty to consider its nature and effect."

Applying this rule, it is clear that the rule of the Pollock case governs this case.

**B. There is no joint-stock company or association.**

1. *The real-estate trust in this case is not a joint-stock company or association.*

Neither the trustees nor the shareholders are incorporated (*Record*, p. 3, par. 9). The trust is only *a settlement* of two parcels of land in Boston by the owners, who were tenants in common. The tenants in com-

mon, who owned the two parcels in various shares, were not an association or company before they conveyed their respective shares to the trustees. They did not become an association or company by conveying their shares in the land to the trustees upon the trusts contained in the declaration of trust. The trustees, to whom the conveyances were made, were not an association or company, and they did not become one by receiving the conveyances. Nothing else was ever done by which an association or company was constituted or organized.

*Smith* v. *Anderson*, L.R. 15 Ch. D. 247, at page 275.

The issue of certificates of shares did not turn either the beneficiaries or the trustees into an association or company. If there had been no such certificates, the owners would have been entitled to the same shares in the beneficial interest, and could have transferred or otherwise dealt with them. The certificates provided an easy means of making the transfers and removed any occasion for otherwise examining the title to the beneficial interests.

If there had been no certificates issued for the shares of the owners in the equitable interest, nobody would have dreamed of calling the trustees, or the beneficiaries, or both together, a *joint-stock company* or *association*. By the Act, it is not enough to create a liability to the tax that the beneficial interest in the property is owned in shares, but it is necessary that there be a joint-stock company or association with a capital stock represented by shares.

2. *The form of organization to be taxed is described in the Act.*

It is further to be pointed out that the Act places a joint-stock company or association in a class with corporations, and provides that every *corporation*, *joint-stock company* or *association*, and insurance company, organized for the purpose and in the manner specified, shall be subject to the tax. It provides in paragraph 3 that an accurate return for the purpose shall be made by each of them "under oath or affirmation of its *president*, *vice-president*, or other *principal officer*, and its *treasurer* or *assistant treasurer*." The mention of joint-stock companies or associations in a class with corporations, and the specification of the officers by whom the return is to be made, shows that only companies or associations with an organization resembling that of corporations were intended. Joint-stock companies or associations do have such organizations, and the organization of trading corporations, when they were originally authorized by law, was adopted from that already in use by joint-stock companies.

The defendants have no such organization, *president*, or *treasurer* or other officers, and there are no persons corresponding to the members of a corporation, company, or association. The trustees are not officers of a company or association. They are the owners of the legal title of the land, which they are bound in equity to deal with in accordance with the deed of trust. They are not elected by the beneficiaries, and can only be removed, and new trustees can only be appointed, in accordance with a power contained in the deed (p. 13, par. 10), by an instrument in writing signed by beneficiaries having not less than three fourths of the

beneficial interest. A sale of the property, or the termination of the trust, may be directed in the same way. But otherwise the action of the trustees cannot be controlled by the beneficiaries.

*Smith* v. *Anderson*, L.R. 15 Ch. D. 247, at pages 275, 276.

**C. The trust was not "organized for profit."**

(1) The purpose of such a joint-stock company or association as is mentioned in the act is the carrying on of some trade or business with a view to profit.

The purpose of the trust under consideration is the management of two parcels of land for the benefit of the owners. A *company* organized for such purposes would not be a company organized *for profit*.

*Reg.* v. *Whitmarsh*, 15 Q.B. 600, 618.
*Boar* v. *Bromley*, 18 Q.B. 271, 276, 277.
*Moore* v. *Rawlins*, 6 C.B. (N.S.) 289, 315–323.
*Smith* v. *Anderson*, L.R. 15 Ch. Div. 247, 273 *et seq.*

(2) The defendants in this case are not an association organized for profit any more than trustees under a will who take a testator's real estate on the usual trusts for management, division of the income during a life or lives in being, and the ultimate division of the principal, are "an association organized for profit." The trusts in the two cases are substantially the same. Under a will the trustees derive their power from a conveyance made by the will. In this case the trustees derive their powers from a conveyance made by deed, but after the conveyance is made the trustees in both cases hold for the like purposes. In both cases the

property may rise in value, in both cases the corpus of the trust may be increased by judicious change of investment, but this is not the purpose of the trust. *The purpose of this trust is the safety and convenient management of the property for the benefit of the owners.*

*Record, pp. 2, 3, secs. 2, 3, 7, 10; p. 9, sec. 1; p. 11, sec. 4.*

**D. The defendants have not "a capital stock represented by shares" within the meaning of the Act.**

1. *They have not "a capital stock" within the Act.*

These words are not found in the Act of 1894, and are inserted here to limit the meaning of the word "associations," and must be given effect accordingly.

The defendants have not a capital stock in any sense except that in which every other tenancy in common, partnership, or other joint individual venture has a capital stock. That there must be shares in the sense of fractions in every joint venture, whether corporate, associate, or otherwise, goes without saying. Accordingly, there are shares in the corpus of a partnership or a testamentary trust.

In order to have a capital stock which justifies taxation under that Act, there must be a reasonable and significant distinction between the persons taxed and other individuals, partners, joint tenants, etc. Every individual who trades and keeps proper books has a "capital stock," or "stock account;" every firm has the same; every fund held by partners, tenants in common or joint tenants, whether trustees or not, may correctly be called "capital."

Corey on Accounts (London, 1839), 90, 91.

If "capital stock" be interpreted as meaning the fictitious property which shareholders have as distinct from the property of the corporation, then there is no such thing here. If it means capital stock such as an individual or two partners have, then individuals and partners should have been taxed also, and no sound line can be drawn at the defendants' method of owning property.

2. *There is no capital stock "represented by shares."*

The Act specifies not only a capital stock, but also one "represented by shares." The Attorney General has asserted that the issue of certificates in cases like this is a mere matter of form and not of substance.

See 28 *Op. A.G.* p. 194 (Feb. 14, 1910).

The certificates issued in this case are merely the evidence of beneficial interests. These interests are not in themselves property subject to separate taxation, as is the case with shares in a real corporation, or in *quasi* corporations organized under statutes which permit the creation of legal property called shares.

3. *The position of the defendant trustees under Massachusetts law.*

The respondents are merely trustees. As Mr. Justice CHARLES ALLEN said in —

*Mayo* v. *Moritz*, 151 Mass. 481, —

> "The deed of trust does not have the effect to make the scrip holders partners. . . . The scrip holders are *cestuis que trust*."

Cf. *Howe* v. *Morse*, 174 Mass. 491, 502.
*Phillips* v. *Blatchford*, 137 Mass. 510.

The following Massachusetts authorities support our contention that mere transferability of shares under a private contract is an immaterial fact: —

*Gleason* v. *McKay*, 134 Mass. 419.
*Opinion of the Justices*, 196 Mass. 603 (1908).

That this mere transferability of shares is immaterial will further appear when it is considered that, although convenient, it is really not essential. Suppose the provision for transfer of shares *inter vivos* was omitted from the declaration of trust; the shares could be transferred in equity just as any chose in action can be transferred in whole or in part, and a court of equity will recognize the transfer.

**E. The defendants are not an association organized under the laws of any state or country.**

In order that the statute may apply to the defendants it must be shown that they are "organized under the laws of Massachusetts." There is no pretence that they are organized under the laws of any other political body named in the statute. The words "*organized under the laws*," etc., mean that the association is one created by virtue of or in accordance with some affirmative provision of statute and deriving some power or benefit from compliance therewith.

If they do not, the whole clause "now or hereafter organized under the laws of the United States or of any state or territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia or now or hereafter organized under the laws of any foreign country and engaged in business in any

state or territory of the United States or in Alaska or in the District of Columbia" becomes meaningless. If mere existence in a community governed by law is enough, the clause would mean the same if all the words from the beginning of the quotation above down to the words "engaged in business" were left out, since every individual, partnership, or business organization exists under the general law and is protected thereby.

Some meaning must be given to the words "organized under the laws," and if any meaning is given to them which will narrow the meaning of the simple words, "association engaged in business, etc.," the defendants cannot be held liable.

The defendants are not "organized under the *laws*" of Massachusetts. The unwritten law is never correctly spoken of in the plural.

> *Swift* v. *Tyson*, 16 Pet. 1, 18.
> *B. & O. R.R. Co.* v. *Baugh*, 149 U.S. 369, 371.

That law in Massachusetts, as in every civilized state, recognizes the right of persons to make contracts with each other. *This is a right recognized rather than conferred by it.* The defendants and the parties interested in the property which they hold derive all the rights and powers from their contract with each other, the indenture (Exhibit A). The immunity, so far as it exists, of the *cestuis que trust* and the trustee from personal liability for debts or obligations of the trustees is secured by contract, partly by the contract in the indenture and partly by the terms of the contracts between the trustees and outside parties, which the trustees must make in such

terms as to secure such immunity. They derive no powers and gain no immunities from any statute (*Record*, p. 12, sec. 5).

This argument is enforced by a comparison between the language used in the statute of 1894 and the language now under consideration. In the statute of 1894 the tax was imposed on the income "of all . . . corporations companies or associations doing business for profit in the United States *no matter how created or organized.*" In the present statute the language is "*organized under the laws*" of a state. There is a distinct difference between the language employed in the two cases, and this distinction must be recognized. The language of the latter Act is narrower than the language of the earlier one, and it can only be given full effect by a construction which will exclude the defendants in this case from liability to taxation.

The expression "*organized under the laws of*" plainly refers to an organization under some statute law authorizing such organization. If there is a statute in any state providing a manner of organizing joint-stock companies and specifying the privileges they should enjoy, it would be quite in accordance with the common use of language to say that a company so formed *was organized under the laws of* that state. There have been such statutes in New York and other places, as appears in *Taft* v. *Ward*, 106 Mass. 518, 522, and the Act undoubtedly refers to companies organized under laws of that kind. See—

*Edwards* v. *Warren Linoline and Gasoline Works*, 168 Mass. 564 (1897).

*Oliver* v. *Liverpool &c. Co.*, 100 Mass. 531 (1868); 10 Wall. 566 (1870).

*People* v. *Wemple*, 117 N.Y. 136.
*Gregg* v. *Sanford et al.*, 65 Fed. Rep. 151.

As to this phrase "organized under the laws," the Attorney General virtually admits that our position is sound in his original brief at page 128, and suggests that —

> "There is no forcing of the language in making it mean, if necessary, a joint stock company deriving from a statute one or more characteristics which the common law would not give it; because a company which takes from a statute no more than it can get from the common law is not organized under the statute in any real sense. The statute in that case is merely declaratory of the common law."

Such a construction will of course prevent the Act from applying to the defendant trustees.

We conclude this topic by referring to two familiar rules of construction peculiarly applicable to taxation statutes.

In the *Spreckels Case*, 113 Federal Reporter, at page 247, Mr. Justice GRAY said, —

> "It is a well settled rule, that the citizen is exempt from taxation unless the same is imposed by clear and unequivocal language, and that where the construction of a tax is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid."

The above statement of Judge GRAY was quoted with approval by Mr. Justice HARLAN in the case of *Spreckels Co.* v. *McLain*, 192 U.S. 397, at page 416.

We also refer to the "cardinal rule of construction" constantly enforced by this Court, that a statute will not be construed so as to violate the Constitution "unless its language imperatively demand it."

See *Knight Templars' Indemnity Co.* v. *Jarman*, 187 U.S. 197, at page 205.
*United States* v. *Del. & Hudson Co.*, 213 U.S. 366, 407.

## II.

IF THE ACT IS CONSTRUED AS IMPOSING A TAX ON THE INCOME OF THE RESPONDENTS IN THIS CASE IT IS UNCONSTITUTIONAL.

**A. This Court has decided that a tax on the income is the tax on the land, and therefore a direct tax, which must be levied according to the rule of apportionment.**

*Pollock* v. *Farmers Loan & Trust Co.*, 157 U.S. 429.
*Same* v. *Same*, 158 U.S. 601.
*Knowlton* v. *Moore*, 178 U.S. at page 82.

We again point out that this limitation on the power of Congress cannot be evaded by the Act under which this case arises.

In considering the purpose of the statute the part which the executive has taken in the construction of the law, and the official or semi-official statement of its purpose, are relevant and material. Without quoting this at length it may be said briefly that in the other briefs statements made in debate by those who supported the Act during the discussion in Congress have

been quoted, and from these it is clear that the President and his advisers thought that a statute could be passed which would fulfil the functions of an income tax, — which would be an income tax for the purpose of revenue, — which would impose the burden directly on income and wealth, and yet would not be an income tax for judicial purposes. As President Taft, in his message recommending the statute, said, "it is a tax which accomplishes the same purpose as a . . . income tax."

The question therefore is raised whether Congress can by a few words inserted in a statute grant to itself a power which the Constitution denies it. In order that this question may be presented clearly, the language of the Act under which the former decisions of this Court were made (Act of 1894), and the language of the Act now in question, are again printed in parallel columns, leaving out non-essential words:

| Act of 1894. | Act of 1909. |
| --- | --- |
| "There shall be . . . collected a tax of two per centum annually on the net profit or income . . . of all . . corporations companies or associations doing business for profit in the United States no matter how created or organized." | "Every corporation, joint stock company or association organized for profit and having a capital stock represented by shares shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation &c. . . equivalent to one per centum upon the entire net income." |

The Court having held in the Pollock case that the first Act could not be sustained because a tax on the income of real estate was a direct tax on the real estate, the second Act, so far as it also imposes a tax on the income of real estate, must be void for the same reason, unless the insertion of the words "*special excise*" before "tax" and the words "*with respect to the carrying on or doing business by such corporation,*" after the word "tax" make the tax valid. In both cases the same thing is taxed, and in both the result to the government and the taxpayer alike is the same. The difference is only in the words used to accomplish this result.

We have already quoted the words of Mr. Justice HOLMES in *Galveston Ry. Co.* v. *Texas*, 210 U.S. 217, —

> "Neither the state courts nor the legislatures by giving the tax a particular name or by the use of some form of words can take away our duty to consider its nature and effect."

Applying this rule, it is clear that the Pollock case governs this case. If it does not, the provisions of the Constitution have little value.

**B. But even if the tax is treated as an excise tax it cannot be sustained.**

In *Pollock* v. *Farmers Loan & Trust Co.*, 158 U.S. 601, the Court said (p. 637) that Congress might "lay excise taxes on business, privileges, employments and vocations," and this, at least, suggests what things may be the subject of an excise tax. The classification

is not complete, for an excise tax may be laid on the doing of certain acts, as is done by stamp taxes.

We contend, however, that whatever may be the subject of the tax it must be uniform throughout the United States, — it must fall alike on all persons in the United States who are doing the "business" or exercising the "privileges employments and vocations," or doing the acts which are taxed, and this rule seems to have been recognized by this Court in *United States* v. *Singer*, 15 Wallace, 111, p. 121, where this Court, speaking of the tax imposed on distillers, says, —

> "The tax here is uniform in its operation, that is, it is assessed equally upon all manufacturers of spirits wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike."

In this case individual owners, partnerships, tenants in common, in fact, the large majority of real-estate owners, are not taxed, though they do exactly the same things and receive their incomes from sources of exactly the same kind. If, therefore, the respondents were taxable the law would establish "one rule for one" owner "and a different rule for another," and the excise would not be uniform.

This requirement of uniformity is in the very essence of constitutional law, and although the Constitution grants to Congress powers of taxation, they are grants of lawful power with the inherent restrictions which distinguish a "government of laws" from a government of men who usurp arbitrary power. Whether these inherent restrictions are expressed in the uniformity clause or are found in the nature of the taxing

power is immaterial. The important thing is the fundamental principle, which is a part of both, that arbitrary discrimination cannot be reconciled with law.

Attorney General Olney and Assistant Attorney General Whitney, in their arguments in the income tax cases, admitted this inherent limitation on the general taxing power. See 157 U.S. at page 507, and 157 U.S. at page 474, where Mr. Whitney said, "there is, however, a certain degree of uniformity involved in the very word 'tax;' a uniformity requirement involved in the definition of that word and guaranteed by the Fifth Amendment to the Constitution . . . A special tax cannot be laid upon A simply because he is A and not B. Such a law would be an attempt to exercise not a taxing power, but the power of eminent domain, and would require compensation for the property taken. Thus the constitution of Pennsylvania provides that taxes shall be 'uniform on the same class of subjects;' while the Supreme Court of that State has decided that this requirement is merely declaratory. *Kitty Roup's Case*," 81½ Penn. St. 211.

> See also Judge COOLEY'S "Constitutional Limitations," pp. 695, 697.
>
> COOLEY, J., in *People* v. *Salem*, 20 Mich. 452, at page 473.

In the early and leading case of *Portland Bank* v. *Apthorp*, 12 Mass. 252, in 1815, Chief Justice PARSONS sustained the bank tax, but added at the end of his opinion, on page 258, —

> "Taxes of this sort must undoubtedly be equal: that is they must operate upon all persons who exercise the employment which is so taxed. A tax

upon one particular monied capital would unquestionably be contrary to the principles of justice and could not be supported."

Within a few months this Court has rendered an important decision on state discrimination under the Fourteenth Amendment in *Southern Ry. Co.* v. *Greene*, 216 U.S. 400, and Mr. Justice DAY said, at page 417, —

> "It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the State is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the State. *While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification.*"

And the Court cited Mr. Justice BREWER'S opinion in

> *Gulf, Colorado & Santa Fé Ry.* v. *Ellis*, 165 U.S. 150, 155, 165.

This Court has already suggested the similarity of the

constitutional restriction on Congress to that upon the states under the Fourteenth Amendment, for in —

*District of Columbia* v. *Brooke*, 214 U.S. 138, Mr. Justice McKenna said, as to the power of Congress to discriminate in its legislation, —

> "Whether such power is expressly or impliedly prohibited the prohibition can not be stricter or more extensive than the Fourteenth Amendment is upon the States."

We submit that there are three indispensable conditions to the constitutional imposition of a tax upon the members of a class when other members of the state are not taxed:

*First*, "there must be such a difference between the situation and the circumstances of all the members of the class and the situation and circumstances of other members of the state" not taxed "as presents a just and natural reason of necessity or propriety for the difference made by the law in their liabilities and rights." "Arbitrary selection," even if it avoids other clauses of the Constitution with the utmost ingenuity, "cannot be justified by calling it classification."

*Second*, "no person who does not belong to the class may be included therein, and all persons within the influence of the legislation relative to the class must be treated alike thereby."

*Third*, "all who are in the situation and circumstances relative to the subject of" the tax "indistinguishable from the situation and circumstances" of the taxed class "must be brought under the influence of the statute and treated by it in the same way as are the members of the class."

The foregoing is paraphrased from *Chicago &c. R.R. Co.* v. *Westly*, 178 Fed. Rep. 619, at 624 (1910), and we submit that it states the law of classification for purposes of taxation.

At the first argument of the *corporation* cases under this Act, last March, the Attorney General made an argument against unincorporated associations, although there were none then before the Court. (See Brief for the United States, pp. 122–129.) He recognized the necessity for a reasonable classification, and contended that this tax was valid because imposed on all who fell within the class of concerns with limited liability and transferable shares.

If limited liability be the thing taxed, this is a concession that "full liability corporations" and all unincorporated concerns with unlimited liability are exempt, whether organized under the laws or not. This construction is not permissible under the language of the Act.

As to transferability, *the statute does not contain any such word as "transferability" or "assignability," but simply the word "shares."*

In connection with this claim that transferability of shares is a peculiar taxable feature under this Act we call attention again to the fact that in these trust agreements the provisions about transfer *do not create the right to transfer*, but are really restrictions on the general right to transfer an equitable interest. They protect the trustees and the trust property from litigation by prescribing that the transfer, to be complete, must be made upon the trustee's books, and they are put in because of the conflict of authority referred to in *Thayer* v.

*Daniels*, 113 Mass. 129, at page 131, as to whether an assignment of a chose in action is complete *without notice* to the trustee or obligor. It is simply applying the registry system to equitable interests.

The general policy of the law has long been in favor of the alienation and of the assignability of property, and except in such peculiar cases as estates tail and spendthrift trusts, transferability is an inherent quality of property. To argue, therefore, that property may be taxed because equitable shares in it are transferable is to argue for a direct tax on all transferable property.

In this connection it should be noted that this is not the question of a transfer tax such as that discussed in *Thomas* v. *United States*, 192 U.S. 363. The argument of the government is an attempt to levy what is miscalled an excise on mere transferability or the potentiality of transfer, and "the element of absolute and unavoidable demand" is present, the absence of which was commented on by this Court in the Thomas case, where Chief Justice FULLER and an unanimous Court upheld the stamp tax on *transfers*, saying, at page 371, —

> "The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates. The stamp duty is contingent on the happening of the event of sale *and the element of absolute and unavoidable demand is lacking.* As such it falls, as stamp taxes ordinarily do, within the second class of the forms of taxation."

Thus the tax on the transfer of shares was sustained on the ground that it was possible to levy an excise tax on the doing of an act which a man might do or not as he chose. The argument of the Attorney General in the present case would make transferability, which is common to every class of property or interest in property, taxable in one class of property and not in other property. Such an exercise of the taxing power is as arbitrary and illegal as the levying of a tax on A "because he is A and not B."

It is apparent that all the marks of classification which are claimed by the government to state a class and to save the tax, on the one hand from being arbitrary, and on the other hand from being direct, can be eliminated by amending the trust agreement.

In other words, all these convenient but unnecessary features which the government has pointed as a basis for classification may be removed and the substance of the thing left. These features are excellent examples of what the Massachusetts Courts have held to be "immaterial facts" from the point of view of the taxing power, as already pointed out.

See *Gleason* v. *McKay*, 134 Mass. 419.
*Minot* v. *Winthrop*, 162 Mass. 113, at pages 121, 122, explaining and affirming *Gleason* v. *McKay*.
*O'Keefe* v. *Somerville*, 190 Mass. 110.

"Taxation," as Mr. Justice PECKHAM and Chief Justice WHITE have said, "is eminently practical . . . and for the purpose of deciding upon validity a tax should be regarded in its actual practical results." (See *Knowlton* v. *Moore*, 178 U.S. 83.)

The practical result of applying this tax to the defendants may be illustrated as follows: —

Four persons who as partners own real estate in Boston, and who manage it and divide the income, would be exempt from taxation thereon when the owners of real estate of the same value on the opposite side of the same street would pay taxes on their income if the estate was held under such an indenture of trust as exists in this case.

The value is the same; the income is derived in the same way, and may be equal in amount; the owners do the same acts in the management of the estate, — yet the partners escape taxation, while the trustees are forced to pay.

We submit as the result of this discussion that the tax cannot be sustained as an excise tax without infringing the restrictions of the Constitution.

## III.

### The Whole Act is Unconstitutional because it Invades the Sovereignty of the States.

The argument that Congress has no power to impose this tax on the income of corporations organized under the laws of the states has been so fully presented in the briefs in the *Flint* v. *Stone-Tracey Co.* and other cases, that we beg leave simply to refer here to the briefs in those cases without repeating the arguments.

We do not claim that the defendant trustees are exempt from taxation on this ground, but that if the Court sustains this contention the whole statute must fail. It cannot be supposed that Congress would have

passed the law unless the incomes of these corporations were reached by it.

It must be added, however, that if the defendant trustees are held to be organized under the laws of Massachusetts the tax will interfere with the local sovereignty of the states as in the case of corporations; while, if they are not so organized, the statute does not reach them.

## IV.

### Conclusion.

*First.* Owning and managing property as property and collecting its income cannot be taxed as a business under the rule laid down in *Pollock* v. *Farmers Loan & Trust Co.* The same rule applies to the interest on bank deposits, although the defendants' income from that source is trifling. Accordingly, if applied to the defendant trustees, the tax is direct and unconstitutional, as their income consists entirely of rentals of real estate and bank interest on those rentals.

*Second.* The defendants are not engaged in "business;" they are not a "joint stock company or association organized for profit;" they have no "capital stock represented by shares;" and they are not "organized under the laws" of any state under any practical interpretation of the Act within constitutional limits.

*Third.* As an attempt to levy an excise tax the statute is arbitrary, and therefore void when applied to these defendants.

The truth is that it was the desire of Congress to levy an income tax, and at the same time it was willing to let a great body of citizens and a great quantity of

property go untaxed, not because of any meritorious claim for exemption, but in order to save the tax from being declared unconstitutional in respect of the direct-tax clause. Hence, when we come to examine the statute, we find that this desire has led to a tax which is arbitrary and discriminating, and is either void as a whole or unconstitutional as to these defendants.

*Fourth.* The Act as a whole is unconstitutional as an interference with the sovereign powers of the state.

Respectfully submitted,

MOORFIELD STOREY,
RICHARD W. HALE,
FRANK W. GRINNELL,
of Counsel.

FILED
APR 11 1910
JAMES H. McKENNEY,
Clerk.

# Supreme Court of the United States

OCTOBER TERM, 1909.

**No. [redacted]496**

MAINE BAPTIST MISSIONARY CONVENTION, *Appellant*,
*vs*,
CHARLES E. COTTING ET AL., *Trustees*.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

## MOTION TO ADVANCE

A. R. SERVEN,
BARRY MOHUN,
B. E. EAMES,
*Of Counsel for Appellant.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

# Supreme Court of the United States

OCTOBER TERM, 1909.

## No. 869.

MAINE BAPTIST MISSIONARY CONVENTION, *Appellant*,
*vs*,
CHARLES E. COTTING ET AL., *Trustees*.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

## MOTION TO ADVANCE.

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.*

Comes now the Maine Baptist Missionary Convention, appellant herein, and respectfully prays this Honorable Court that the above entitled cause may be advanced upon the docket of this court and set down for oral argument at an early date, and in support thereof states as follows:

I.

Appellant is a corporation duly organized and existing under the laws of the State of Maine.

II.

The appellees, Charles E. Cotting and Charles F. Adams, 2d, are both citizens of the Commonwealth of Massachusetts and are trustees of the "Department Store Trust," under and by virtue of an agreement and declaration of trust dated February 12, 1903, and recorded in the Registry of Deeds for the County of Suffolk in said Commonwealth of Massachusetts.

III.

The said "Department Store Trust" is not a corporation, joint stock company or association organized under any general or special law of the United States or of the Commonwealth of Massachusetts or of any other State or jurisdiction. Said trust exists solely by virtue of the agreement and declaration of trust hereinbefore referred to.

IV.

The appellant, a *cestui qui trust* under the aforesaid declaration of trust brought this bill in its own behalf and in behalf of others similarly situated, against the defendants to restrain their compliance with Section 38 of the Act of Congress entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes." Defendants filed a general demurrer to said bill and the cause having come on to be heard the demurrer was sustained, the bill dismissed, and an appeal to this court was brought and allowed.

V.

This suit is one of a civil nature cognizable in equity and arises under the Constitution and laws of the United States; it is a controversy between citizens of different States and the matter in dispute exceeds, exclusive of interest and costs, a sum or value of $2,000; and this suit arises under the Internal Revenue Laws of the United States.

VI.

Appellant files this motion at this time, while this Court still has under consideration the Corporation Tax cases, solely in view of and because of the filing on April 8, 1910, of a motion to advance on behalf of appellant in the case of Eliot vs. Freeman *et al.*, No. 802, October Term, 1909, of this court, but without subscribing to the various statements therein contained. The appellees in said case of Eliot vs. Freeman are trustees under a declaration of trust which in essential respects is similar to the "Department Store Trust."

If the relief prayed for by appellant in the case of Eliot vs. Freeman be granted by this Honorable Court, appellant herein respectfully prays that similar relief be afforded it and will abide by such terms in regard to oral argument or submission upon briefs without argument as the court may impose.

Notice of this motion has been served on counsel for the appellees and proof of service filed with the clerk of this court. Notice has likewise been given to the Attorney-General and to the Solicitor-General.

Respectfully submitted,

A. R. SERVEN,
BARRY MOHUN,
B. E. EAMES,
*Of Counsel for Appellant.*

Supreme Court, U. S.
FILED.
OCT 10 1910
JAMES H. McKENNEY,
Clerk.

# Supreme Court of the United States

October Term, 1910 No. 496

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## Maine Baptist Missionary Convention

APPELLANT

*v.*

## Charles E. Cotting et. Al., Trustees

APPELLEES

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ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

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## MOTION TO RE-ASSIGN

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A. R. SERVEN
BARRY MOHUN
B. E. EAMES
*Of Counsel for Appellant*

# Supreme Court of the United States

OCTOBER TERM, 1910.

No. 496.

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MAINE BAPTIST MISSIONARY CONVENTION,
APPELLANT,

*v.*

CHARLES E. COTTING, ET AL., TRUSTEES, APPELLEES.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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## MOTION TO RE-ASSIGN.

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TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now Maine Baptist Missionary Convention, Appellant herein, and respectfully prays this Honorable Court that the argument in the above entitled cause now set for Tuesday, October 11, 1910, may be postponed and that said cause may be re-assigned for argument to be heard as the next case after the argument of the cause entitled, *Flint* v. *Stone Tracy Company, et al.*, and other causes heretofore argued therewith, and known as the Corpora-

tion Tax cases; or in the alternative to be heard at as early a date after the decision of the Court upon said Corporation Tax cases as the Court may fix; and said Appellant in support thereof, states as follows:

I.

This cause has been heretofore assigned by this Court for argument on Tuesday, October 11, 1910. At the time when said order of assignment was made, the said Corporation Tax cases had been argued before this Court, but had not been ordered to be re-argued. At the time of said order, it was also supposed that the date so assigned would be subsequent to the decision of this Court in said Corporation Tax cases.

Subsequently, however, this Court ordered a re-argument of said Corporation Tax cases.

II.

The Appellees, Charles E. Cotting and Charles F. Adams, 2d, are Trustees of the "Department Store Trust" so-called, under and by virtue of an agreement and declaration of trust dated February 12, 1903, and recorded in the Registry of Deeds for the County of Suffolk in the Commonwealth of Massachusetts.

III.

The said "Department Store Trust" is not a corporation, joint stock company or association organized under any general or special law of the United States or of the Commonwealth of Massachusetts or of any other State or jurisdiction. Said trust exists solely by virtue of the agreement and declaration of trust hereinbefore referred to.

IV.

That this cause involves not only the question of the constitutionality of Section 38 of the Act of Congress entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States and for other purposes" known as the Corporation Tax Law, but that the primary issue raised in said cause is the *applicability* of said Corporation Tax Law to said "Department Store Trust" and to the Appellees as Trustees thereof.

V.

That by reason of the fact last stated above, this cause cannot properly be consolidated with or heard as one case with said cases involving corporations, and that by reason of the number of said cases now pending before this Honorable Court involving corporations, which cases have been heretofore argued and a re-argument ordered as hereinbefore set out, and also by reason of the precedence of said corporation cases upon the docket of this Court, the questions relating to the *constitutionality* of said Corporation Tax Law can be better and more properly presented to the Court in said cases and at some time later than the present, and the issue of the *applicability* of said law to real estate trusts of the character of the "Department Store Trust" herein, may properly be postponed to be argued either immediately after the argument in said Corporation cases or, in the Court's discretion, immediately after the decision thereof by the Court, in which latter case no argument thereof will be required unless the Court shall sustain the constitutionality of said law.

VI.

This cause presents the grounds of jurisdiction which are presented in the case entitled *Eliot* v. *Freeman, et al.*, No. 448, October Term, 1910, heretofore also assigned for oral argument on October 11, 1910, namely: it is a suit of a civil nature, cognizable in equity and arising under the Constitution and laws of the United States, and particularly under the Internal Revenue laws of the United States. It also presents the additional jurisdictional ground of diversity of citizenship, the Appellant being a corporation organized and existing under the laws of the State of Maine, and the Appellees being both citizens of the Commonwealth of Massachusetts and the property of said "Department Store Trust," being situated wholly in the City of Boston; the matter in dispute also exceeding, exclusive of interest and costs, the sum of Two Thousand Dollars ($2,000.00).

VII.

The Appellant is uncertain as to the propriety of filing this motion for a re-assignment prior to any re-assignment of said Corporation Tax cases since it is impossible to state any specific date herein upon which an assignment is desired. This motion, however, is filed at this time and in its present form prior to any re-assignment of said Corporation Tax cases, and in lieu of a motion merely to postpone until the further order of this Court the oral argument now set for October 11, 1910, solely because of the filing of a motion on behalf of the Appellant in said cause entitled *Eliot* v. *Freeman, et al.*, requesting an assignment immediately after the re-argument of said Corporation Tax cases.

The Appellees in said cause of *Elioi* v. *Freeman* are Trus-

tees under a declaration of trust essentially similar to the "Department Store Trust."

That it appears from the records in said causes, that the entire property in this cause is subject to a long lease for 30 years from July 1, 1905, and that the Trustees, Appellees herein, merely receive the rentals, pay the taxes and assessments on said property, interest on the two mortgages covering the same, and the net income at proper times to the *cestuis que trustent* and that with the exception of minor duties, the foregoing constitute the sole acts of the respondents as such Trustees, and that it appears from the foregoing that the Trustees herein are in the position of receiving rent or income, in its strict sense, from real estate, without the carrying on of activities which might be regarded as doing business; that it is desirable that the Court in considering such real estate trust cases, should have before it a trust of this particular character, and that the present case differs in this respect from said case of *Eliot* v. *Freeman*.

If the relief prayed for by Appellant in the said cause of *Eliot* v. *Freeman* be granted by this Honorable Court, Appellant herein respectfully prays that similar relief be afforded it and it will abide by such terms as regards the time permitted for oral argument as the Court may impose.

Notice of this motion has been served on counsel for the Appellees and proof of service filed with the clerk of this Court. Notice has likewise been given to the Attorney-General.

Respectfully submitted,

A. R. SERVEN,
BARRY MOHUN,
B. E. EAMES,

*Of Counsel for Appellant.*

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# Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 496.

MAINE BAPTIST MISSIONARY CONVENTION,

APPELLANT,

*v.*

CHARLES E. COTTING AND CHARLES F. ADAMS, 2D,

TRUSTEES, ETC.

**APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.**

## BRIEF FOR APPELLANT.

This is an action brought originally in the Circuit Court of the United States for the District of Massachusetts by Maine Baptist Missionary Convention, a corporation duly organized and existing under the laws of the State of Maine and having its usual place of business in the City of Portland, in said state, as a *cestui que trust* or holder of certificate representing the beneficial interest in a trust commonly known as the "Department Store Trust," of which Charles E. Cotting of Boston, in the County of Suffolk, and Charles F. Adams, 2d, of Concord, in the County of Middlesex, both in the Commonwealth of Massachusetts, are trustees under an agreement and declaration of trust dated February 12, 1903, and recorded with Suffolk County Deeds, Book 2924, page 274. The action is brought against said

trustees to restrain them from paying the tax or otherwise complying with the provisions of Section 38 of the act of Congress approved August 5, 1909, known as the "Corporation Tax Law." The material provisions of the act are as follows:

> "That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed."

The action is in equity. It is founded, as to jurisdiction, *first*, upon diverse citizenship, the appellant being a citizen of the State of Maine, and the appellee a citizen of the State of Massachusetts, and the matter in dispute exceeding, exclusive of interest and costs, the sum of $2,000, and, *second*, upon the fact that it is a suit arising under the Constitution and laws of the United States, and especially under the Internal Revenue laws of the United States.

A demurrer was filed on behalf of the defendants, and in the Court below the demurrer was sustained and the bill dismissed.

The plaintiff appealed directly to this Court pursuant to the Statute.

## ASSIGNMENTS OF ERROR.

The assignments of error are as follows:

(1) The Court erred in deciding that Section 38 of the Act of Congress entitled "An act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes" approved August 5, 1909, is applicable to said Department Store Trust or to the defendants as trustees thereof or that such trusts or any similarly constituted were intended by Congress to be included within the scope or effect of said section.

(2) The Court erred in deciding that said Department Store Trust or the defendants as trustees thereof were carrying on or doing business within the meaning of said Section 38 of said act of Congress and that therefore said Department Store Trust or the defendants as trustees thereof were within the scope and effect of said section.

(3) The Court erred in deciding that the tax imposed by said Section 38 of said act of Congress is not a direct tax and therefore although not apportioned among the states, is constitutional and valid, thereby violating the requirements of the constitution of the United States and particularly of Sections 2 and 9 of Article I. thereof to the effect that no direct tax shall be levied unless apportioned.

(4) The Court erred in deciding that the tax imposed by said Section 38 of said act of Congress is not, as applied to said Department Store Trust or the defendants as trustees thereof, a direct tax and therefore, although not apportioned among the states, is constitutional and valid, thereby violating the requirements of the constitution of the United States and particularly of Sections 2 and 9 of Article I. thereof to the effect that no direct tax shall be levied unless apportioned.

(5) The Court erred in deciding that the provisions of said Section 38 requiring the preparation and filing of returns and constituting the same public records, in destroying the privacy of the business affairs of the defendants as trustees of said Department Store Trust, did not involve depriving said defendants and said trust of their property without due process of law or a taking of their property for public use without just compensation in violation of the constitution of the United States and particularly of the Fifth Amendment thereto.

(6) The Court erred in deciding that the provisions of said Section 38 of said act of Congress requiring the preparation and filing of returns and constituting the same public records and requiring payment of a tax equivalent to one per centum upon the entire net income over and above Five Thousand Dollars ($5,000) received from all sources during each year, does not involve depriving said trust and the defendants as trustees thereof of their property without due process of law and a taking of their property for public use without just compensation in violation of the constitution of the United States and particularly of the Fifth Amendment thereto.

(7) The Court erred in deciding that the provisions of said Section 38 as applied to said Department Store Trust or the defendants as trustees thereof or the *cestuis que trustent* thereunder, do not involve depriving said parties in interest therein of their property without due process of law or the taking of their property for public use without just compensation in violation of the constitution of the United States and particularly of the Fifth Amendment thereto.

(8) The Court erred in deciding that the provisions of said Section 38 as applied to said Department Store Trust

or the defendants as trustees thereof or the *cestuis que trustent* thereunder do not involve the depriving of said parties in interest therein of their respective rights to act as trustees and *cestuis que trustent* and as such to deal with property, to own and lease the same and to receive the rents and income thereof, in violation of the constitution of the United States and particularly of the Fifth Amendment thereto.

(9) The Court erred in deciding that the provisions of said Section 38 as applied to said Department Store Trust or the defendants as trustees thereof or the *cestuis que trustent* thereunder, although the same are not applicable to individuals or copartnerships, nevertheless do not involve the depriving of the parties in interest therein of their property without due process of law, in violation of the Constitution of the United States and particularly of the Fifth Amendment thereto.

(10) The Court erred in deciding that the tax imposed by said Section 38 as applied to said Department Store Trust and the defendants as trustees thereof, although such tax is not imposed upon individuals acting or holding property other than in a trust capacity, nevertheless does not involve arbitrary or unreasonable classification, in violation of the constitution of the United States and particularly of the inherent conditions and requirements in the grant of the taxing power to Congress, and does not deprive said trust estate and the parties interested therein of liberty and property without due process of law, in violation of the constitution of the United States and particularly of the Fifth Amendment thereto.

(11) The Court erred in deciding that the tax imposed by said Section 38 as applied to said Department Store Trust and the defendants as trustees thereof, although such tax

is not imposed upon trusts existing under wills or under agreements or declarations of trust in which the beneficial interest, irrespective of the number of beneficiaries thereunder, is not represented by certificates nevertheless does not involve arbitrary or unreasonable classification, in violation of the constitution of the United States and particularly of the inherent conditions and requirements in the grant of the taxing power to Congress and does not deprive said trust estate and the parties interested therein of liberty and property without due process of law in violation of the constitution of the United States and particularly of the Fifth Amendment thereto.

(12) The Court erred in deciding that the provisions of said Section 38 requiring the preparation and filing of returns are a proper exercise of power granted the Congress of the United States and are not in excess of the power so delegated, in violation of the constitution of the United States and particularly of the Tenth Amendment thereto.

(13) The Court erred in deciding that the provisions of said Section 38 are a proper exercise of power granted the Congress of the United States and are not in excess of the power so delegated in violation of the constitution of the United States and particularly of the Tenth Amendment thereto.

(14) The Court erred in deciding that said Section 38 is not unconstitutional and void and in holding the same constitutional and valid.

(15) The Court erred in sustaining the demurrer to said bill of complaint.

(16) The Court erred in dismissing the said bill of complaint with costs.

## INTRODUCTION.

These assignments of error set up various grounds upon which the appellant contends that the act in question is unconstitutional and void, that even if constitutional it is inapplicable to the said Department Store Trust, and also set up generally that the Court erred in not granting the relief prayed for, in sustaining the demurrer and in dismissing the bill.

The nature of the Department Store Trust is set forth in the Declaration of Trust and the bill in this cause. The trustees under a certain agreement of trust, which has been duly recorded, hold certain land and a building thereon, which they have leased for thirty years to one tenant for use as a department store. The subscribers received from the trustees transferable certificates in denominations of one hundred dollars, evidencing their interest as beneficiaries of the trust. The tenant is in full and exclusive possession of the building and makes repairs. The trustees receive the rent, deduct their commission and from time to time make payments of income to the beneficiaries and otherwise perform in respect to said property the ordinary duties of trustees.

The Department Store Trust is a voluntary trust created by deed and exists under the authority of no statute of Massachusetts. It differs in no respect from any voluntary trust created by deed affecting real estate, except in having a large number of beneficiaries and in having the beneficial interests represented by transferable certificates.

These real estate trusts have long been common in Massachusetts; but so far as we are aware they are seldom found elsewhere in the United States. As regards the cir-

cumstances of their creation, they vary all the way from cases where real estate held in common by members of a family is conveyed to trustees and certificates representing their beneficial interests are received in exchange to cases where persons associate themselves together for the purpose of real estate development and finance the trust by public subscriptions.

As to the Department Store Trust reference to the record (page 2) shows that the circumstances surrounding its creation were midway between the two extremes.

In legal contemplation, these trusts are all the same; and in all respects except as hereinafter mentioned, they are governed by the ordinary rules of law governing trusts, whether created by will or deed or by operation of law. The legal title to the property is held by the trustee; the taxes on the property are assessed to and paid by the trustee, and are distributed by the State among the several towns in the same manner as taxes upon probate and other trusts. The duty of the trustee to the beneficiaries is the equitable duty to account and can be enforced only in equity. The obligation of third persons in dealing with the trustee to ascertain his powers is the same as in ordinary trusts. If in any respect the liabilities of the trustees or the beneficiaries of these real estate trusts differ from those of ordinary trusts, it is only in the cases of implied contracts or torts. The Courts of Massachusetts have not decided this question. If there is any difference it is only, that the real estate trust can be considered for this purpose as that kind of partnership known as a joint stock company at the common law. There is under the laws of Massachusetts no intermediate form of association between a corporation and a partnership.

The following cases, decided by the Supreme Judicial

Court of Massachusetts may be referred to as explaining the nature and character of the real estate trust as it exists under the laws of that state.

*Howe* v. *Morse*, 174 Mass. 491 (1899).
*Hussey* v. *Arnold*, 185 Mass. 202 (1904).
*Linnell* v. *Leon*, 206 Mass. 71 (1910).
*Kinney* v. *Stevens* (decided Jan. 4, 1911).

If the act in question is sustained, assuming the *Pollock* case is to remain law, it must be sustained on one of three grounds, namely, (1) that it levies a tax on certain franchises; (2) that it levies a tax on the exercise of certain franchises; (3) that it levies a tax on the doing of business. It seems clear without argument that on either of the first two grounds, the act must be held inapplicable to this trust: it has no franchise, and it exercises none. It is contended that even if the tax as a whole should be held constitutional on the third ground, viz. as an excise tax on "carrying on or doing business," yet the act must be held inapplicable to this trust.

## I.

### The Statute should be strictly limited to Objects clearly within its Terms.

The general principle that all tax laws should be construed strictly, is well established.

Sutherland on Statutory Construction, 2d Ed., Secs. 536 and 537, and cases cited,
Cooley on Taxation, p. 453 *et seq.*,
*United States* v. *Wigglesworth*, 2 Story, 369 (C. C. U. S. Dist. Mass. 1842),
*Benziger* v. *United States*, 192 U. S. 38 (1903),
*Sewall* v. *Jones*, 9 Pick. 412 (1830).

In *Spreckels Co.* v. *McClain*, 192 U. S. 397, 416 (1903), Mr. Justice Harlan quotes with approval these words of Mr. Justice Gray in *Spreckels Co.* v. *McClain*, 113 Fed. at 247:

> It is "a well settled rule that the citizen is exempt from taxation unless the same is imposed by clear and unequivocal language and that where the construction of the tax is doubtful the doubt is to be resolved in favor of those upon whom the tax is sought to be laid."

If the act is constitutional, the case before this Court involves a question solely of the interpretation of a tax statute; namely, the question whether the Department Store Trust is comprehended by the terms of the Corporation Tax Act.

## II.

### The Statute is Inapplicable because its Terms do not include the Department Store Trust.

**(a) The Department Store Trust is not a "corporation."**

It is clear without argument that the Department Store Trust is not a "corporation." There is certainly no legal entity created either by special statute or under a general corporation act, and the trust is not treated as a corporation in the state where located. For instance, no returns to the Corporation Commissioner of that state are required. As a matter of fact corporations for holding or managing real estate are very rare in Massachusetts. They must be chartered by special act and cannot be organized under the general laws.

Mass. Acts of 1903, c. 437, § 7, as amended by Acts of 1906, c. 286.

**(b) This trust is not a "joint stock company or association organized under the laws," etc.**

It may be admitted that the purpose of the parties in entering into this trust was the gaining of profit, but it is contended that the trust is not in any sense a "joint stock company or association" within the meaning of the act; that both the word "company" and the word "association" refer in the act solely to statutory forms of organization which are discussed in detail in this brief; and that the Department Store Trust is not "organized under the laws" of any state within the meaning of the act.

(*1*) *The Trust is not "organized under the laws."*

The Department Store Trust is not "organized under

the laws." The word "laws" should be held to include only statute laws, and not the general body of the common law. There is no provision of the statute law in Massachusetts which has any reference to the organization and powers of the Department Store Trust or which vests it with special privileges over those individuals, partnerships or trustees existing by the non-statutory law. That the word "laws" means statutes was decided by *Brinckerhof* v. *Bostwick*, 99 N. Y. 185 (1885). Here the question was whether the liability of a director of a corporation to account by reason of neglect and inattention was barred by a provision limiting to three years the time for bringing actions against directors "to recover a penalty or forfeiture imposed, or to enforce a liability created by law." The Court held that the action was not barred, being a common law liability; that the statute limitation applied to liabilities created by statute; and in general that the phrase "created by or under the laws of the state" in the Code meant by or under statute law. In *State* v. *Sioux City, etc., R.R.*, 43 Minn. 17 (1890), it was held that a law requiring any "corporation or association . . . hereafter . . . created or organized under the laws of this State" to pay a certain tax at the time of filing the articles of association or incorporation applied to an Iowa Railroad Company which by legislation of Minnesota had received powers, franchises, and privileges from the State of Minnesota.

Again, the natural meaning of the word "organized" connotes an idea of creating an entity, if it does not connote actual incorporation, as was held in *Dodge* v. *Williams*, 46 Wis. 70, where it is said that "a voluntary association may be formed at will; but it can be legally organized by authority of statute only." The primary meaning of "organize" as given in the Century Dictionary is "to render

organic; give an organic structure to"; and another definition there given is: "in general, to form into a whole consisting of interdependent parts." The idea of an "entity" seems clearly implied in these definitions. It seems to be an unusual use of a term to call the Department Store Trust "organized." A corporation is "organized." A trust is *made, declared, created,* or *entered into,* but hardly "*organized.*"

See also *Hinds v. Marmolejo*, 60 Cal. 229, 231,
*Daggs v. Phœnix National Bank*, 53 Pacific 201,
*Lindsey & Phelps Co. v. Mullen*, 176 U. S. 126.

Of the two Vermont cases which are sometimes cited to prove that "organized under the laws" includes common as well as statutory law, both can be clearly distinguished. The first of these is *Lycoming Fire Insurance Co.* v. *Wright,* 60 Vt. 515. Here the Court held that under a statute forbidding foreign insurance companies to collect premiums in Vermont unless by the laws of the state where organized they should be liable for the acts of their agents, such liability by the common law of Pennsylvania was sufficient to bring a company within the terms of the act. The Court said that "the words 'laws of the state' are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof." The Court broadened the interpretation of the phrase for the purpose of this particular case in order to carry out the obvious purpose of the Vermont statute. The other case is *State* v. *Dyer*, 67 Vt. 690, and here the decision of the Court was an example of the usual interpretation of a penalty statute strictly against the state.

(2) *Certain statutory "joint stock companies and associations," essentially different from this trust are "organized under the laws" as legal entities.*

If we take the expression "joint stock company or association organized under the laws" to mean a joint stock company or association, organized under and by virtue of certain statutes, and deriving certain special privileges therefrom, we describe a form of organization which has a real existence in this country and is radically different from the Department Store Trust.

Various definitions may be found of the expression "joint stock company or association." Some of these definitions exclude, and some include, the idea of statutory privileges. In *Lyon* v. *Dennison*, 80 Mich. 371 (1890), it is said that "a joint stock company at the common law lies midway between a corporation and a copartnership. It is an association of persons for the purpose of business, having a capital stock divided into shares, and governed by articles of association, which prescribe its objects, organization and procedure, and the rights and liabilities of its members, except that the articles cannot release the members from their liability as partners to the creditors of the company. There is an essential difference between a joint stock company as it existed at the common law and a joint stock company having extensive statutory powers conferred upon it by the state within which it is organized."

This trust is not a "joint stock company or association" within the act, even if the words "organized under the laws" were omitted or were held to include common law organizations. This trust is not an active business enterprise such as are the typical joint stock companies which are described in the cases. As will be pointed out in more detail, this trust differs in no essential respect from the ordinary trust

created by deed or will. In *Hussey* v. *Arnold*, 185 Mass. 202, (1904), a trust of this character was treated as subject to the ordinary rules of trusts rather than as either a partnership or a corporation. In that case it was held that the plaintiffs who sold coal to the trustees, for their use as trustees, could not acquire a legal lien against the real estate since at law the land belonged to the trustees and in equity to the beneficiaries. Further in *Attorney-General* v. *Mercantile, etc., Insurance Co.*, 121 Mass. 524 (1876), in holding that the provisions of a statute as to payment of dividends by "joint stock fire and marine insurance companies" applied to a corporation incorporated by special act, the Court said, "The words 'joint stock company' as used in the statutes of this Commonwealth refer to companies organized under the general laws as corporations." A similar definition of the phrase "joint stock company" is given in the Code of West Virginia, 1899, p. 544, c. 53, § 1.

But with the words "organized under the laws" included in the act it is difficult to believe that the statute can be held to apply to the Department Store Trust. Organizations exist, which are known to the law as joint stock companies or associations, which are organized under and privileged by statutes of the states, and which are plainly distinguishable from this trust. Cook on Corporations, Sec. 505, puts the importance of the distinction thus:

> "There is an essential difference between a joint stock company as it exists at common law and a joint stock company having extensive statutory powers conferred upon it by the State within which it is organized. The latter kind of joint stock company is found in England and in the State of New York. To such an extent have these statutory powers been conferred on joint stock companies that the only substantial difference between them and corporations is that the members are not exempt from liability as partners for the debts of the company."

In *Andrews Bros. Co.* v. *Youngstown Coke Co.*, 86 Fed. 585 (1898), a case decided before Judges Taft, Lurton and Clark of the Circuit Court of Appeals for the 6th Circuit, Judge Lurton says:

> "These associations authorized by the Pennsylvania Act of 1874 possess every attribute deemed essential to the existence of a corporation under any authoritative definition of a corporation. They come into being only by the creative power of the sovereign will, as expressed in the statute which authorizes their organization. That act constitutes at once the authority for their existence and the measure of their powers. When organized they constitute a new artificial person, endowed with the power of suing and being sued, and of acquiring, holding and conveying property in its artificial character. Created by compliance with the constating law, they can be dissolved only in the way pointed out by that law,"

and the Court goes on to point out some of the other corporate attributes which are discussed below.

It is not necessary that we should attempt to enumerate all the states which ever had or now have such statutory joint stock companies. It should be pointed out that none such are known in Massachusetts. It is said in *Ricker* v. *American Loan & Trust Co.*, 140 Mass. 346 (1885), that there is no intermediate form in Massachusetts between a corporation and a partnership, although a joint stock company may exist under the common law of that state, solely as a partnership (*Phillips* v. *Blatchford*, 137 Mass. 510; 1884). The following statutes define the privileges of the statutory joint stock associations in certain other of the leading commercial states of the country:

Pennsylvania, Act of June 2, 1874,
Virginia, Act of March 2, 1875,

Michigan, Compiled Laws, 1897, Ch. 160,
New Jersey General Statutes, 1895, p. 2440,
Ohio, Annotated Statutes, 1904, Sec. 3161,
New York, "Joint Stock Associations Law," Code of 1909.

The one principal difference between these organizations and corporations is that, while they have an artificial entity, this does not, in and of itself, avoid individual liability on the part of the members, in the absence of further statutory provisions to that end. The existence of these organizations as separate entities is brought out clearly by consideration of a number of characteristics, which show that these statutory organizations differ radically from the Department Store Trust, and greatly resemble corporations.

(*aa*) In court proceedings these organizations are generally treated as corporations in so far that by virtue of the statutes actions may be brought by or against them in their association names.

New Jersey Act, *ubi supra*, Sec. 9,
Michigan Act, Sec. 10,
Ohio Act, Sec. L,
Pennsylvania Act, Sec. 11.

In *Oakridge Coal Co.* v. *Rogers*, 108 Pa. St. 147 (1884), an action of trespass against the association in its association name was held to lie by reason of the trespass of its manager, of which the members of the association were actually unaware, under a statute allowing exemplary damages for certain trespasses by "person or corporation."

The same result is achieved in New York by permitting actions to be brought by or against the organization in the name of an official designated by the statute. The fact that this privilege is derived from statute is emphasized by the fact that no officer other than the one which the statute suggests, even though designated by consent of the members, may be treated in this way as representative of the organization. Under this provision of the New York statute a member of a joint stock company may bring suit directly against his company or the company against its member.

*Wescott* v. *Fargo*, 61 N. Y. 542 (1875),
*Saltsman* v. *Schultz*, 14 Hun, 256 (1878),
*Van Aernam* v. *Bleistein*, 102 N. Y. 355 (1886),
*Hibbs* v. *Brown*, 98 N. Y. Supp. 353 (1906),
190 N. Y. 167 (1907).

In the case of the Department Store Trust there are the same rules in all respects as to parties and procedure in actions at law and in equity which are applicable to other trusts. In this connection it is to be pointed out that in Massachusetts, unlike many other states, the ordinary trusts created by deed are not subject to the jurisdiction of the Probate Court. While the Probate Court in all cases of trusts under wills appoints or removes trustees and passes upon their accounts, yet in cases of trusts under deeds the trustee derives his office solely from the instrument which creates the trust and can be called to account only in the courts of equity. In this respect the trust in the present action is exactly like other Massachusetts trusts created by deed.

The cases where the question of the jurisdictional resemblance of these organizations to corporations has arisen

in courts other than those of the state where organized, show a divergence of opinion which is pertinent. In the Federal Courts formerly these organizations were treated jurisdictionally as corporations. *Andrews Bros. Co.* v. *Youngstown Coke Co.*, ubi supra. But since the case of *Great Southern Fireproof Hotel Co.* v. *Jones*, 177 U. S. 449 (1900), the contrary has been held.

See also *Saunders* v. *Adams Express Co.*, 136 Fed. 494 (1905),
*Fred Macy Co.* v. *Frank Macy*, 135 Fed. 725 (1905),
*Taylor* v. *Weir*, 171 Fed. 636 (1909),
*Chapman* v. *Barney*, 129 U. S. 677 (1889).

In Massachusetts the courts have never allowed the joint stock companies of other states to be treated as an entity in court proceedings.

*Taft* v. *Ward*, 106 Mass. 518 (1871),
*Bodwell* v. *Eastman*, 106 Mass. 525 (1871),
*Gott* v. *Dinsmore*, 111 Mass. 45 (1872),
*Boston, etc., R.R. Co.* v. *Pearson*, 128 Mass. 445 (1879),
*Edwards* v. *Warren, etc., Works*, 168 Mass. 564 (1897).

The pertinence of the foregoing cases lies in the fact that they show that these organizations, whose characteristics in most respects are those of corporations, are yet sufficiently distinct so as to require a special mention of them to bring them clearly within the present act.

In *State* v. *Adams Express*, 66 Minn. 271 (1896), it was held that service of a writ of mandamus on the head officer

in Minnesota of a New York joint stock company would be sufficient.

In *Platt* v. *Colvin*, 50 Ohio St. 703 (1893), and *Adams Express Co.* v. *State*, 55 Ohio St. 69 (1896), service in one case upon the president of a New York joint stock company, and in the other case service as upon a corporation were held sufficient.

*Edgeworth* v. *Wood*, 58 N. J. L. 463 (1896), *Boatner* v. *Am. Ex. Co.*, 122 Fed. 714 (1903), and *Adams Ex. Co.* v. *Schofield*, 111 Ky. 832, are somewhat similar cases.

(*bb*) Respecting the title to the property of the association,—in the Department Store Trust this matter is left entirely to agreement between the persons interested, without any statutory assistance. In *Byam* v. *Bickford*, 140 Mass. 31 (1885), it is held that an unincorporated association aside from statute cannot take title to real estate.

In the case of the statutory joint stock companies, however, the law sometimes puts the title to the real estate in the name of an officer specified by law. (New York Joint Stock Associations Law, Sec. 6). In other cases, the statute permits title to be taken in the name of the association, which may even have a seal for use on deeds of the property.

New Jersey Statute, *ubi supra*, Secs. 37, 39,
Ohio, Sec. L,
Michigan, Sec. 10,
Pennsylvania, Sec. 12,
*Eliot* v. *Himrod*, 108 Pa. 569 (1885),
*Brier Hill Coal & Iron Co.* v. *Atlas Works*, 146 Pa. 290 (1892),
*Appeal of Kountz*, 204 Pa. St. 432 (1903).

(*cc*) If the Department Store Trust should be considered a joint stock company at common law, as regards liability for torts, such liability would be a partnership liability. On the other hand, it was held in *Whitney* v. *Backus*, 149 Pa. St. 29 (1892), that a member of a Pennsylvania joint stock company (like the stockholder of a corporation) would not be liable individually for the torts of the managers of the association unless he should personally participate. It was pointed out in *Hill* v. *Stetler*, 127 Pa. St. 145, 162 (1889), that "members do not act as individuals or as partners, but through and in the name of the collective or corporate body."

(*dd*) In *Kossakowski* v. *People*, 177 Ill. 563 (1889), it was held that an express company organized under the laws of New York as a joint stock company is sufficiently a corporation to sustain an indictment for the embezzlement of its funds as of the funds of a "corporation." It can hardly be conceived that the embezzlement of the funds of the trustees of the Department Store Trust could by any court be held to be the embezzlement of the funds of a "corporation."

(*ee*) In respect to the taxation of these statutory joint stock companies under state laws a significant conflict of authority has developed. In New York, under an act taxing on their capital "all moneyed or stock corporations deriving an income or profit from their capital or otherwise," certain express companies were held exempt from taxation in *Hoey* v. *Coleman*, 46 Fed. 221 (1891), and in *People* v. *Coleman*, 133 N. Y. 279 (1892). In the latter case the Court points out that in interpreting a tax act the legislative use of terms must be closely followed and that the word "cor-

poration" could not be held to apply to this joint stock company. On the other hand in *People* v. *Wemple*, 117 N. Y. 136 (1889), a tax upon any

> "corporation, joint stock company or association incorporated or organized under any law of this state"

was held applicable to such an organization.

In Pennsylvania a similar distinction was drawn between a statute taxing "corporations incorporated by any other state" and a statute taxing

> "every corporation, joint stock association and limited partnership whatever now or hereafter incorporated or organized by or under any law of this commonwealth or of any state . . . doing business in this commonwealth."
>
> *Sanford* v. *Gregg*, 58 Fed. 620 (1893), 65 Fed. 151 (1895).

It thus appears that, under the decisions of New York and Pennsylvania, in order to include these statutory joint stock companies and associations with corporations in a tax act, they must be mentioned in terms. The familiarity of Congress with these statutes and decisions doubtless accounts for the use of a phrase which would leave no doubt that it included the statutory joint stock company and associations, of which certain of the large express companies are prominent examples. There is no indiaction in the present Act that Congress intended to do more.

No tax is laid upon these trusts in Massachusetts except the ordinary tax upon the property. This property is taxed to the trustees like the property of any other trust.

The beneficiaries have a purely equitable interest in the property and no tax is laid upon their interest.

*Hussey* v. *Arnold*, ubi supra,
*Kinney* v. *Stevens* (decided by Mass. Supreme Judicial Court Jan. 4, 1911).

It is to be noted, however, that in one case originating in Massachusetts statutory joint stock companies were treated as corporations for the purpose of taxation.

*Liverpool, etc., Co.* v. *Oliver*, 100 Mass. 531, 10 Wall. 566 (1870).

The Court held in that case that an English statutory joint stock company was "so far clothed" with corporate powers as to be taxable under a Massachusetts statute taxing at an increased rate "insurance companies organized or associated under the laws of any government or state other than one of the United States."

(*ff*) Perhaps the most important statutory privilege given in certain states to the statutory joint stock company is the privilege of limited liability. In Massachusetts there is no statute to help the Department Store Trust in this respect.

In New York there appears to be no restriction on the unlimited liability of the members of a statutory joint stock company. It is possible for the members to contract expressly with third persons that the latter shall resort only to the trust assets to satisfy any claims but this is solely a matter of agreement.

*Hibbs* v. *Brown*, 98 N. Y. Supp. 353 (1906); 190 N. Y. 167 (1907).

But in certain of the other states above mentioned which have statutory joint stock companies there are definite provisions for a limited liability. The provision in these cases is that creditors shall first bring an action against the association in the association name and only in case judgment against the association proves valueless may they bring an action against the individual members and then only to recover the amount unpaid upon their original subscriptions. The statute in each case contains a provision that the capital of the company must not be impaired.

New Jersey Act, Sec. 2, 6,
Michigan Act, Sec. 2, 6,
Ohio Act, Sec. B, F,
Pennsylvania Act, Sec. 2, 6,
*Coal Co.* v. *Rogers*, 108 Pa. St. 147 (1884),
*Stevens* v. *Ball Club*, 142 Pa. St. 52 (1891),
*Staver & Abbott, etc., Co.* v. *Blake*, 111 Mich. 282 (1896).

In the last-mentioned case the Court holds that if a person contracts with an association organized under the statute relying entirely on the association's liability he does not acquire the right to maintain assumpsit against individual members simply by discovering some technical defects in the management and composition of the association. The Court says that

> "this is a legal entity—and it is immaterial what name you give it—with which the plaintiff dealt, made contracts, and to which it gave credit."

Perhaps the most vivid illustration of the difference between statutory joint stock companies and the Department Store Trust is found in the provisions in some of these

statutes to the effect that third persons may acquire no valid right of action for a claim amounting to $500 or more unless they rely upon a written contract signed by more than one of the managers of the association; and in the fact that the existence of this provision is notice to the third parties of this qualification upon the power of the association to contract, such that third parties, although actually ignorant of the limitation, are nevertheless bound by its terms. Surely this is a most valuable privilege given by the statutes in those states which is unlike anything of which the Department Store Trust can avail itself.

Pennsylvania Act, Sec. 5,
Michigan Act, Sec. 5,
Ohio Act, Sec. E,
New Jersey Act, Sec. 5,
*Citizens Savings Bank* v. *Vaughan*, 115 Mich. 156 (1897),
*Rhoades* v. *Malta Vita Co.*, 149 Mich. 236 (1907),
*Pittsburgh Melting Co.* v. *Reese*, 118 Pa. St. 355 (1888),
*Walker* v. *Keystone Brewing Co.*, 131 Pa. St. 546 (1889),
*Mercantile Nat'l Bank* v. *Lauth*, 143 Pa. St. 53 (1891),
*Andrews Bros.* v. *Youngstown Coke Co.*, 39 Fed. 353 (C. C. Pa. 1889),
*Dickinson* v. *Matheson Motor Car Co.*, 161 Fed. 874 (C. C. Pa. 1908),
*Park Bros.* v. *Harwi*, 2 Kan. App. 629; 42 Pacific, 939 (1895).

In the Dickinson case above cited the Circuit Court held the provision of the Michigan statute binding in a suit

brought in the Pennsylvania Circuit; and in the Kansas case the Pennsylvania law was held applicable to prevent a suit in Kansas for the breach of an oral contract. These two cases are evidences of the view of the Courts that this is an essential statutory qualification upon the powers of the company and not merely a qualification affecting the court of the forum.

In the foregoing analysis it appears clearly that there is a form of organization in this country which has a real existence, which is "organized under the laws," and which is radically different from the Department Store Trust. That the development of these statutory joint stock companies is not merely accidental is shown by the Pennsylvania Court in *Laflin & Rand Co.* v. *Steytler*, 146 Pa. St. 434 (1891), where the Court points out that the Act of 1874

> "was not a mere amendment or supplement to anything that went before, but . . . a new scheme, carefully and elaborately drawn, creating a new kind of artificial person standing between a limited partnership as previously known and a corporation and partaking of the attributes of each."

With these words compare the words of the Supreme Judicial Court of Massachusetts in *Ricker* v. *American L. & T. Co.*, 140 Mass. 346, to the effect that

> "there is no form of organization between a corporation and a partnership, like the joint stock companies of England and some of the United States, known to the laws of this Commonwealth."

The Court which made this statement well knew that real estate trusts had long existed in Massachusetts. Compare also the decision reached in *Linnell* v. *Leon*, 206

Mass. 71 (1910), that the Statute of 1903, Ch. 423, Sec. 1, defining the rights of pledgors and pledgees of capital stock, and Revised Laws, Ch. 109, Sec. 38, on the same subject, relate only to corporation stock and not to shares of a real estate trust.

An examination of the many cases in which the courts discuss the rights and remedies of third persons with respect to statutory joint stock companies shows that in imposing liability the courts sometimes liken these organizations to corporations and sometimes to partnerships. The real estate trusts, both in their nature and in their historical development, are essentially trusts, and such resemblance as they may have to a corporation or a statutory joint stock company is merely incidental.

(3) *The only reasonable interpretation of the act excludes real estate trusts.*

A classification which selects all organizations deriving statutory privileges from the state and taxes them is reasonable and gives a fair and natural result. If the statute be extended to cover the real estate trust, there is no reason why it should not be extended to all probate and other trusts, as well as to individuals and partnerships. Like the real estate trust, these also derive no privileges from the statutes. The mere fact that the interest of beneficiaries of a trust is evidenced by certificates is immaterial because this is done under the authority of no statute.

The possibility of this distinction between joint stock companies with some statutory privileges and trusts like the one in the case at bar is admitted on page 128 of the brief for the United States at the original argument

in the Corporation Tax Cases. The distinction is there set forth in the following words:

> "However, if limitation of the statutory language to statutory companies be unavoidable, still complete uniformity may be maintained in the application of the law; because then the phrase 'organized under the laws,' etc., must be taken to mean companies *really* organized under a statute, in the sense of deriving from the statute some quality or incident which cannot be gotten under the common law; and uniformity therefore will remain, though the operation of the tax may be unfortunately restricted. There is no forcing of the language in making it mean, if necessary, a joint stock company deriving from a statute one or more characteristics which the common law would not give it; because a company which takes from a statute no more than it can get from the common law is not organized under the statute, in any real sense. The statute in that case is merely declaratory of the common law."

The same distinction is recognized on page 33 of that brief in these words:

> "Business done by a corporation or joint stock company, under the exceptional and advantageous rules of law applicable to them, is not the same, in either a legal or a practical view, with kindred business done by individuals or partnerships."

And again on page 71

> "It [this tax] applies only to business when conducted in the special methods and with the peculiar advantages resulting from the special rules of law relating to a corporation or joint stock company."

This very distinction is taken in the discussion by the Court in *Spotswood* v. *Morris*, 12 Idaho, 360 (1906),—a case which has been supposed to be contrary to the con-

tentions of this brief. In holding the unincorporated association for the purchase of lands in the name of certain trustees legal in spite of a constitutional provision that corporations are only to be organized by general law, the Court pointed out that the organization exercised no corporate powers or privileges not possessed by individuals.

> "To possess or exercise the powers or privileges of corporations requires a sovereign grant—a franchise which said association has not and does not profess to possess."

The classification above suggested is reasonable. The line is clearly defined between those organizations contemplated by the act and those outside. Any other line of demarcation would be indefinite and would rest upon no sound distinction.

**(c) This trust has no "capital stock represented by shares."**

In the next place, the Department Store Trust has not a "capital stock represented by shares" within the meaning of the act. The definition of "capital stock" in Cook on Corporations, Section 8, is:

> "The sum fixed by the corporate charter as the amount paid in or to be paid in by the stockholders for the prosecution of the business of the corporation and for the benefit of the corporate creditors. The capital stock is to be clearly distinguished from the amount of property possessed by the corporation."

Now in the case of the Department Store Trust there is no charter fixing the amount of any capital stock. It is exactly the same as if the persons interested in the trust were mere partners or were the beneficiaries of a probate

or other voluntary trust. Nobody is under any legal obligation to maintain the capital and refrain from paying dividends out of capital as is the case with corporations and as is the case with the joint stock companies under the statutes of Pennsylvania, Ohio, New Jersey and Michigan. (See Section 6 of the Joint Stock Company Statute of each state.) Is it reasonable to say that the mere fact that the interests of the beneficiaries of the Department Store Trust are evidenced by pieces of paper should make a distinction between this trust and other trusts? This evidencing of the ownership is but an incidental, not a vital, characteristic of the Department Store Trust. Should this trust be held taxable under the Corporation Tax Act solely by reason of that characteristic, there would be no legal difficulty in calling in all the certificates and henceforth evidencing the ownership of beneficial interests merely on the books of the trustees and requiring a transfer by power of attorney filed with them.

It is universally recognized that shares of capital stock of a corporation are personal property and that the shareholder has no interest legal or equitable in the property of the corporation. On the other hand, it has been held in a number of cases in Massachusetts that the holder of shares (so called) in a real estate trust has merely an equitable interest in the property which is held by the trustees.

*Hussey* v. *Arnold* 185 Mass. 202 (1904),
*Linnell* v. *Leon*, 206 Mass. 71 (1910),
*Kinney* v. *Stevens* (decided Jan. 4, 1911).

**(d) This trust is not "carrying on or doing business."**

In the next place, this trust is not "carrying on or doing business" within the meaning of the statute. It appears from the record, page 4, that the only duties of the trustees

of the said trust are to receive from the lessees of the real estate the annual rental thereof, and to pay over to the proper authorities the taxes and assessments, to pay at stated times the interest due upon the mortgages on said real estate, to pay over the net income at proper times to the *cestuis que trustent* according to their respective interests and to perform minor duties and maintain a bank account in their names as such trustees. In the ordinary acceptation of the words, do such acts as have just been described, such care and management over real estate investments, constitute "carrying on or doing business"?

It was decided in *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, also 158 U. S. 601, that the income from real property or investments in personal property could not be taxed under the income tax law.

It was also decided in the *Spreckels Sugar Refining Company* case (192 U. S. 397) that under the law which imposed a special excise tax upon the business of refining sugar, measuring such tax by the gross income from the business, the income from real estate which was primarily used by the company in connection with and in the prosecution of its business of sugar refining was properly included in computing the tax.

If the tax in the *Pollock* case had been nominally an excise tax upon the doing of the business of investing one's own property, it is scarcely conceivable that the Court would have reached any different conclusion as to the directness of the tax. If an individual were compelled to pay a tax upon the income from his investments in real estate, it would not matter whether the tax were called a tax upon his income from that source, or whether he were described as being engaged in the business of investing his property in real estate.

Every person who has investments in real estate, unless they be of that unusual character which is sometimes found, —namely, very long leases where the owner parts entirely with the control of the property and simply remains passive and receives the rentals,—is obliged, in the proper care of his investments, to look after his property, to make repairs when needed, and to attend to the making of leases, enforcing collection of rentals, evicting tenants, paying taxes, and generally the care and management of the property. This was doubtless true in the *Pollock* case, and it requires no argument to show that if a similar tax were admitted to be levied upon the business of managing real estate, then so far as such so-called "business" consisted in the management of one's own investments in real estate and the proper care and oversight over one's property as incidental to such investments, such tax would be open to the identical objections which were found insuperable in the *Pollock* case. In other words, it would not help the tax to change its name.

If the tax be regarded, therefore, as a tax upon the doing of business, it cannot be applied to the so-called business conducted by the Department Store Trust, for if it did, it would be, at least as to such trust, unconstitutional and void.

Let us assume a trustee owning real estate, all of which he has leased for a long term of years, so that the only reason for the existence of the trust is that the trustee may receive the rentals from such real estate and transmit the same to the beneficiaries. We have, then, a case of pure investment. In such case it would seem clear that a tax "with respect to the receipt of such income" is a tax upon the income itself. To call this receiving of income "business" and to hold that by so doing the tax which was be-

fore unconstitutional and void can be made constitutional and valid, would be a mere subterfuge. But, as has been noted above, all investments in real estate, apart from this exceptional kind of investment, involve as incidental thereto some degree of care and attention to the property.

The question then is,—does this care and attention which is given by an owner to his property as incidental merely to the protection and preservation of his investment, constitute the carrying on or doing business within the meaning of this act? We are led to the conclusion that it does not, and that this is independent of the question whether these same incidental acts of care and management, if done independently by some one other than an owner of such property, would or would not constitute the "carrying on or doing business" within the statute.

In *Parker Mills* v. *Commissioners of Taxes*, 23 N. Y. 242, a statute of the State of New York enacted that all persons and associations "doing business" in the State of New York, as merchants, bankers or otherwise, and not residents of the State of New York, should be assessed and taxed on all sums invested in any manner in such business. The Parker Mills was a foreign corporation manufacturing nails in Massachusetts and Rhode Island. It had a depot and agent in the city of New York to whom it transmitted nails for sale. Its only business within the State of New York consisted in making such sales, the proceeds of which were remitted to the corporation in Massachusetts. The annual sales of the agent in New York City amounted to about three hundred thousand dollars ($300,000) and the value of the nails which he had in store was ten thousand dollars ($10,000). The Court said (per Selden, J., pages 243-244):

> "The words descriptive of the property in respect to which they are to be assessed, are among the most indefinite in the language. The word 'business' embraces everything about which a person can be employed; and a sum is 'invested' whenever its amount is represented by anything but money. No conclusion can be arrived at in this case, by following out the precise lexicographical meaning of these terms. The statute is to be interpreted, therefore, by the light to be obtained from its general scope and tenor: from other statutes *in pari materia:* and from a consideration of the evils and abuses at which it was aimed."

And the Court proceeded to hold that the acts which took place in New York were so far merely incidental to the manufacturing business of the Company that they did not constitute the doing of business within the statute, and consequently that the corporation was not subject to the tax.

See also *Alabama and Chattanooga Railroad Company*, 9 Blatchford, 390.

We deduce from the foregoing, therefore:

*First.* That the present act is to be interpreted not by giving the broadest possible interpretation to the words "carrying on or doing business" because that would lead to results at once unreasonable and unconstitutional.

*Second.* That the carrying on or doing business is not to be applied to every activity which may be carried on; and that, where similar language has been used in other cases, the courts have restricted the application of the words to the principal or primary pursuit or occupation and have not extended it to matters purely incidental.

Following out this reasoning, it would seem appropriate that if the principal pursuit is not such as would be properly described as "carrying on or doing business" any acts or things which might be done as incidental to such prin-

cipal pursuit should be regarded merely as merged in the principal pursuit and not independently "carrying on or doing business."

Construing this act, therefore, in the light of previous statutes and of the line of cases in which those statutes have been passed upon, also in the light of what was clearly the primary purpose of the act, namely the taxing of the ordinary forms of corporate activity,—mercantile and commercial business,—the natural conclusion is as follows:

If a group of persons is engaged solely in the occupation or pursuit of investing money in either real estate or personal property and if they do nothing except such acts and things as are purely incidental to such investments and to a proper care and attention to the subject of the investments, for the protection and preservation thereof, then they are not engaged in business within the act even though such acts done by them as incidental to their investing operations might, if done by others as an independent pursuit, fall within the statute.

If these incidental matters were a business, it would be recognized as the ordinary business of a real estate broker. As done by these trustees, however, these acts of care and management are similar to those done by many banks and trust companies as regards property which they hold as trustees for other parties. While these institutions, in case the present act is held constitutional, may be taxed on the income which they receive as commissions for such services, it is hardly conceivable that they can be required to pay a tax on the entire income received from property which they hold in trust, which income they pay over to their beneficiaries.

On the other hand, if any organization or association is

principally engaged in some form of occupation which is clearly to be regarded as the doing of business, such, for example, as the common forms of manufacturing or mercantile pursuits, and if in the conduct of such business it uses real estate incidentally and such real estate contributes to the aggregate income from the business, yet it may be proper, in case of an excise tax upon such business, to measure the amount of the tax by the entire income without deducting anything on account of the real estate.

The decision in the *Spreckels* case goes to the point of deciding that, in the case of such excise tax upon the business of sugar refining, the income from real estate actually used by the company and primarily so used as incidental to the carrying on of its business of sugar refining may be included in the income from the business, for the purpose of measuring the amount of the tax.

The distinction above indicated is the natural result from the conclusions reached in the *Pollock* case and the *Spreckels* case; the one holding that the income from real estate and invested personal property is not taxable without apportionment, and the other that the income from real estate actually used primarily as incidental to a business which is properly subject to an excise tax, may be included in measuring the amount of the excise tax upon such business.

If we were to assume for a moment, for purposes of argument, that certain acts and things, when done by an individual, do not constitute the "carrying on or doing business," it would seem fairly to follow, that, if the same acts and things were done by a combination of individuals, they would likewise not constitute the "carrying on or doing business" by the combination. So, if we assume that an individual, in investing his money and doing such things

as are essential for properly protecting and caring for his investment, is not engaging in business, it would seem to follow that a combination of persons in doing the same things is not engaging in business, any more than the individual.

If this be conceded, and if the words "carrying on or doing business" in the present act are to be construed as including such acts of investment, the tax would be laid directly on income from real estate and invested personal property. Assuming the present act to be valid, then, we are brought into direct conflict with the *Pollock* case. The Congress would be able, by a slight change in language from the law of 1894, to enact a general law taxing incomes from invested real estate and personal property. It would be necessary only to describe the tax as laid upon this so-called "business" of investing one's funds, instead of upon the income itself.

If the *Pollock* case is to stand,—and all the debates in the Congress assumed the validity of that decision,—the result above pointed out would seem to indicate strongly that Congress could not have intended the phrase "carrying on or doing business" to include such investment.

Let us consider the matter for a moment in another aspect, and perhaps more broadly. The terms "business" and "investment," to the ordinary mind, convey quite opposite and contrary meanings. The one connotes the carrying on of some pursuit,—manufacturing, trading or constructing, primarily utilizing the energies of the individual in the production of wealth; the other conveys the idea of placing one's money,—the product or profits of business,—in some form of property so that it may yield a return *of itself;* the one speaks of *activity*, the other of *inactivity;* the one is primarily *active*, the other primarily *passive*. It

may not be easy to define this difference with accuracy, but one feels that it would not be difficult to place any particular case in the class to which it belongs.

The distinction then is not fanciful but real,—between "business" on the one hand and "investment" on the other; and the term "business" can no more include "investment" than the term "activity" can include "inactivity."

Moreover, he who is engaged in business, although his object is to obtain the profits of his labor to himself, is, nevertheless, economically speaking, primarily engaged in serving others.

> "Business may be taken to include all provision for the wants of others, which is made in the expectation of payment direct or indirect from those who are to be benefited. It is thus contrasted with the provision for our own wants, which each of us makes for himself, and with those kindly services which are prompted by family affection and the desire to promote the well-being of others."
>
> Marshall, Principles of Economics, page 348 (London, 1891).

On the facts as they appear from the record, it is submitted that the Department Store Trust is not doing business within the meaning of the act, and consequently is not taxable under the act.

**(e) If interpreted so as to include real estate trusts, the act would be unconstitutional.**

It is contended by the complainant that if the corporation tax act were held applicable to trusts of the character of that in this case, the act would be in that respect un-

constitutional. If this is so, it is a sufficient reason under well-recognized rules for an interpretation which would avoid that result.

The contentions of complainant under this heading are directed primarily to three points: namely,

(1) That the tax if so laid would be a direct tax;
(2) That the tax if so laid would lack equality;
(3) That the publicity provisions are beyond the power of Congress.

These points have been elaborately and fully discussed by the briefs of various counsel in the corporation tax cases, so far as they have to do with the corporations. It remains only to consider briefly the application of these principles to the case of the real estate trust.

(1) *The tax would be direct.*

The arguments which have been advanced on this point in the corporation cases apply with much greater force to the case of a real estate trust. As appears from the record (p. 4), substantially the only income received by the trustees in this case consists of rentals from real estate. The position of the trustees is identical in every respect as regards the property and the income therefrom with the position of an individual investor owning similar property. Such an investor is strictly within the decision in the *Pollock* case. It is difficult to perceive any ground of distinction between such individual and these trustees.

In a case like the present, whether these trustees are regarded as "carrying on business" or not, the tax, if constitutional and applicable, would fall directly on the income from real estate and on nothing else.

(2) *The tax would lack equality.*

The power of taxation, although a necessary power of government, is not a power to be exercised arbitrarily or unreasonably. It is a power which inherently demands to be exercised on the principles of reasonable equality. This requirement of reasonable equality must exist, independent of any uniformity provisions. It was assumed by counsel on both sides in the *Pollock* case to be a necessary condition in the grant of the taxing power to Congress. Although the equality requirement would doubtless permit classification in taxation just as in the exercise of the police power of the states, yet such classification in the exercise of the federal power of taxation, just as in the exercise of the state power of police, should be based upon some reasonable distinction. Just as, in the exercise of the police power, a burden cannot be laid upon one class in the community and not upon others, unless the two classes differ in some respect which has relation to the burden,—so, in the exercise of the taxing power, a tax should not be laid upon a commodity or a business in the hands of one class and not upon the same commodity or business in the hands of another class unless there is some reasonable basis for the distinction, having regard to the nature of the tax. As stated in Gray on Limitations of Taxing Power and Public Indebtedness, Secs. 706 and 707:

> "The view established by authority is that the words [*i.e.*, of the uniformity clause] as used in the constitution, refer to mere geographical uniformity. It is not intended by this to say that Congress can lay indirect taxes violative of all principles of equality and uniformity as between persons. Congress *is* limited in this regard; but its limitations are derived

> —not from the words 'uniform throughout the United States'— but from the general nature of all legislative power to tax, from the inherent elements of uniformity and equality which partly make up the concepts of taxation and taxes. The restrictions upon Congress in this regard arise from the very nature of legislative power as a power held in trust for the whole people. The express language of the constitution has not—and was not intended to have—that meaning."

Cooley on Taxation, page 260, says:

> "When, for any reason, it becomes discriminatory between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible. It is immaterial on what ground the selection is made."

Even though it should be held that *Knowlton* v. *Moore*, 178 U. S. 41, has settled the law that the uniformity clause (Article I., Sec. 8, Paragraph 1) requires only geographical uniformity, yet in *Lane County* v. *Oregon*, 7 Wall. 71, and *Veazie Bank* v. *Fenno*, 8 Wall. 533, it was held that there are certain fundamental limitations; and in *Knowlton* v. *Moore*, at pages 109, 110, and in *McCray* v. *U. S.*, 195 U. S. 27, 64, the principle is substantially conceded.

In the grant of the taxing power to Congress, it was not intended to authorize the levying of a tax as to a certain subject-matter upon one class of persons and not upon others unless there should be a reasonable basis for the distinction.

Arbitrary or unequal classification in taxation would seem also to be within the express prohibition of the "due process" clause in the Fifth Amendment to the constitution. The laying of a tax burden upon certain individuals or classes which is not laid upon other individuals or classes

becomes arbitrary when there is no reasonable basis for the classification or distinction. In such case the levy should be termed an arbitrary exaction and not a proper tax. When we consider the ideals of equality which were in the minds of the framers of the constitution, it is not going too far to interpret the due process clause as protecting all persons against such arbitrary exactions.

The act in the present case, if applied to these trusts, would violate the principle of equality in the following particulars:

1. It would lay the burden of the tax upon these trustees and beneficiaries, while at the same time it would not so burden trustees and beneficiaries in trusts existing under wills or under other agreements or declarations of trust created by deed, irrespective of the number of beneficiaries, so long as the beneficial interests were not represented by certificates.

2. It would impose the tax upon these trustees and their beneficiaries, while it would not impose the tax on individuals and copartners investing in similar property.

3. It would impose the tax upon trustees under trusts of this character, while it would not impose the tax on individuals holding property otherwise than in a trust capacity.

4. It would impose the requirements of publicity upon these trustees and their beneficiaries and not on trustees of other trusts nor upon individuals or copartners investing in similar property.

It is recognized that under the "due process" clause of the Fourteenth Amendment the states cannot interfere with the *freedom of contract* except in the proper exercise of

some paramount power. Cf. *Lochner* v. *U. S.*, 198 U. S. 45 (1905). The fact that the Corporation Tax Act, if applied to real estate trusts, would interfere with the freedom of parties to enter into such agreements, serves at least to emphasize the inequality which would exist if these trusts were held subject to the act.

(3) *The publicity provision is beyond the power of Congress.*

The requirement of the publicity clause, even under the recent regulations promulgated by the Treasury Department, would, if the act is held applicable to real estate trusts, be a serious burden upon them. The act is passed ostensibly under the taxing power. If, however, it is not primarily designed as a revenue measure, but primarily as a means of affording the Federal Government control over corporations, creatures of the states, and without regard to whether they are engaged in interstate commerce, it would seem to be outside the taxing power of Congress, and not being sustainable under any other granted power would not be constitutional. Compare *McCray* v. *U. S.*, ubi supra.

Again, if so applied to real estate trusts, there is strong ground to contend that this publicity provision involves the depriving of property without due process of law.

**(f) The actual intention of Congress did not include real estate trusts.**

The classification suggested above, excluding real estate trusts from the terms of the act, is consistent with the probable purpose which Congress wished to achieve. Congress was not passing a law taxing individuals or trustees, but a law taxing *corporate business*. The very title by

which the act is known is the "corporation tax law" and it is its application to corporations which is usually discussed. The reasons have been suggested above why the special form of statutory joint stock company must have been in the minds of those who drafted the act, but there is nothing to indicate that such trusts as the Department Store Trust were within the contemplation of Congress. If the law is held applicable, there can be little doubt that it will be an accidental result.

In the Message of June 16, 1909, in which the President recommends the tax, he refers to it as an excise on the privilege of doing business "as an artificial entity." In the debates on the act in Congress Senator Root said:

> "So I say this case [*Pacific Insurance Co.* v. *Soule*, 7 Wall. 433] establishes the fact that it is competent for the United States to make a classification for the purposes of taxation of certain kinds of corporations created under the laws of the states and to impose a tax upon their business." (44 Congressional Record, p. 4070.)

Again (p. 4071):

> "This measure which adopts possession of the corporate facility and privilege as the basis of classification will include some other corporations other than those affected by the tariff, but the great mass of them are engaged in matters that are affected by the protective tariff or in interstate commerce or in business which is affected by our treatment of the currency."

Again (p. 4080) quoting from the then pending bill thus:

> "All corporations whether organized under the laws of the United States or of any state or territory of the United States . . . or organized under the laws of any foreign country and engaged in business in any state or territory of the United States," he added, "are to

> pay a special excise tax with respect to the carrying on or doing business by such corporation; that is the rule applied to all corporations that come within the purview of the act."

It is well known that the attention of Congress for some years has been largely engaged with legislation relative to combinations in restraint of trade and public service corporations engaged in interstate commerce. It is at least a current impression that the desire to regulate corporations was one of the moving causes for the passage of the Corporation Tax Act. Both of these facts tend to exclude the idea of an intention on the part of Congress to levy a tax which should apply to such a trust as that which is found in the present case.

Again, the wording of the act, in some incidental but significant respects, bears out the contention that it was intended to tax organizations having an *entity*. The section repeatedly alludes to the "corporation, joint stock company or association" which is subject to the tax as "it," and provides that returns shall be under oath of "its president, vice-president, or other principal officer, and its treasurer or assistant treasurer." The Department Store Trust has no president or vice-president, treasurer or assistant treasurer, or other officers, in any proper sense.

If then it be true that Congress did have in mind the statutory joint stock companies, what words more apt than those in the act could have been used? What phrase better calculated to set at rest for the purposes of the Act the doubt raised by some of the cases which have excluded statutory joint stock companies or associations from the operation of state tax laws which contained only the word "corporation"?

What phrase better calculated to make plain that Con-

gress did not intend that any organizations which derive the essence of their life from statutes should escape the tax law by reason of their organization under one statute rather than another?

## III.

THE JUDGMENT OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS SHOULD BE REVERSED.

Respectfully submitted,

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BURTON E. EAMES,
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TYLER & YOUNG,
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*Of Counsel.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1910.

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| AMORY ELIOT, APPELLANT, *v.* JAMES G. FREEMAN, ROBERT A. Boit, Nathaniel Thayer, and Robert H. Gardiner. | No. 448. |
| MAINE BAPTIST MISSIONARY CONvention, appellant, *v.* CHARLES E. COTTING AND CHARLES F. Adams, 2d, trustees, etc. | No. 496. |

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*APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.*

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## BRIEF FOR THE UNITED STATES.

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### STATEMENT.

The above-named cases arise under section 38 of the act of Congress approved August 5, 1909, chapter 6, 36 Stat., 11, 112–117, known as "The Corporation Tax" enactment. No questions affecting the

constitutionality of the section other than those which have already been treated in the previous corporation-tax cases are presented by either of the above cases, but they do present certain questions concerning its construction, calling for separate treatment, which are as follows:

1. Does the tax apply to unincorporated joint-stock companies and associations organized under the common law of a State?

2. If so, are the Cushing Real Estate Trust and the Department Store Trust such joint-stock companies or associations?

3. Are they engaged in business within the meaning of section 38 of the act of August 5, 1909?

THE CUSHING REAL ESTATE TRUST.

The Cushing Real Estate Trust was organized for the purpose of buying, selling, renting, improving, and holding certain lands and buildings in Boston, Mass. (R., 9, 11.) The title to its property, according to the declaration of trust under which it was organized and has since carried on its affairs, was and is vested in trustees, to whom its management is also entrusted. (R., 2, 9, 10, 11, 12, 13, 14.) The trustees, under the authority of said instrument, have issued 4,800 transferable shares, of the par value of $100 per share, in exchange for the property. (R., 2, 12, 13.) The shareholders have no direct control over the property or the business connected with it, but are entitled to the net profits and income in dividends in such amounts as the trustees deem

best. (R., 11, 12.) Indirectly, however, they control the property and business of the so-called trust as completely as the stockholders of a corporation control its business and property. The holders of three-fourths of the shares in value have the power to terminate the so-called trust, to organize a new trust to take its place, and to depose one or more of the existing trustees, and to substitute new trustees in their stead. (R., 13, 14.) The trustees call meetings of the shareholders in their discretion, or whenever requested in writing by five shareholders, or by shareholders owning not less than one-tenth of the shares in value. (R., 14.)

If the trustees refuse to call the meeting in compliance with the request, the same number of shareholders may proceed to call the meeting. The so-called trust, unless sooner terminated by the shareholders, is to continue for 20 years after the death of the last survivor of a certain number of specified persons (R., 10–13).

The trustees have successfully pursued the object for which the trust or company was organized, and the net income and profits derived from its transactions exceed $5,000 per annum (R., 2, 3). They have built one building and leased it to a single tenant for a period not specified in the bill (R., 2). They also maintain and operate an office building, which is leased to many tenants, whom they supply with elevator service, janitor service, and heat (R., 2).

THE DEPARTMENT STORE TRUST.

The Department Store Trust differs from the Cushing Real Estate Trust chiefly in the scope of its present business transactions. The principal portion of the Department Store Trust's property consists in a building built by it, and now leased to one company for a number of years (R., 3). The rest of its property was purchased subject to a lease, which expires in May, 1912. The bill does not clearly show whether this portion of the property consists of one or more buildings (R., 3).

The Department Store Trust was organized for the purpose of buying a certain parcel of land in Boston, Mass., erecting a building suitable for a department store thereon, and of leasing the same, when erected, in whole or in part. (R., 9, 10.)

Its capital stock was raised by subscription for transferable shares of stock of the par value of $100 per share. The title to the property, according to the instrument under which it was organized, and has since conducted its affairs, was and is vested in trustees, who manage the property and affairs of the company and pay such dividends as they deem expedient. (R., 9, 10, 11.) The shareholders meet annually and the holders of a majority of the shares have full power to depose and elect trustees to alter and amend the trust agreement (R., 11, 12), and to otherwise indirectly control the transactions of the so-called trust. The trustees have pursued the object for which the company or trust was organized, and the net income exceeds $5,000 per annum.

## ARGUMENT.

### I.

**The tax imposed by section 38 of the act of August 5, 1909, chapter 6, applies to joint stock companies and associations organized under the common law of the respective States.**

The exact language of the section, so far as concerns this question, is as follows:

> That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; * * *. (Sec. 38, c. 6, p. 112, Act of Aug. 5, 1909.)

Congress plainly meant "every" joint stock company or association which was organized for profit, with a capital stock represented by shares, and which was organized under the laws of any State of the United States.

It did not limit the act to incorporated joint stock companies, for they were already included under the head of corporations. Nor did it provide as a requisite that the association should possess any franchise or privilege granted by the legislative authority.

The organization contemplated was not that the association should be constituted by the State or its laws, for that is not true even of the great mass of corporations. They are not created by specific statute, nor are they brought into being by an act of the State, but they are organized pursuant to the statutes by the voluntary action of the original associates.

Is it necessary to bring a company within the scope of the act that the State in which it operates shall by statute authorize its existence and prescribe the rules of its conduct?

The act of Congress uses the word "laws" and not "statutes." Had it intended the lesser scope of the latter word it is a fair presumption that it would have used that word.

There is nothing in the nature of the act which points to the restricted meaning. It imposes a tax upon every joint stock company or association organized for profit and having a capital stock represented by shares. Indeed, in addition to using the

term "joint stock association" it gives very nearly a full definition of the term, omitting only the element of the transferability of the shares.

The association is the same whether recognized and ruled by the common law or by statute. In each case it possesses the facility which invokes the tax, and that is a continuity of existence as an association despite the mutability and mutation of its membership.

So there is no reason for limiting the scope of the word used by Congress.

The common law is just as much as the statutes a part of the laws of a State, and the statutes are often nothing more than declarations of the common law.

In *Van Ness* v. *Hyatt* (13 Pet., 293, 298), this court had under consideration the provision in the act concerning the District of Columbia of February 27, 1801 (chap. 15, 2 Stat., 103), which provided:

> That the laws of the State of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that State to the United States, * * *

and held that the word "laws" included the common law. Mr. Justice Barbour, in discussing the meaning of the provision which has just been quoted, said:

> * * * we must be governed in deciding this case, by that law which Congress enacted for the District of Columbia, on assuming jurisdiction over it. They adopted the laws of Maryland then in force, so far as regards

> that part of the district in which this question arises. Amongst those laws, is the common law.

In *Morsell et al.* v. *The First National Bank*, 91 U. S., 356, 359, this court approved its previous interpretation of the word "laws" in an opinion by Mr. Justice Swayne, who, after quoting the provision above referred to, said:

> A part of the laws so adopted was the common law. *Van Ness* v. *Hyatt*, 13 Pet., 298.

In *Bucher* v. *Ches. R. R. Co.*, 125 U. S., 555, 583, 584, this court had under consideration the meaning of the word "laws" as used in the judiciary act of September 24, 1789, chapter 20, section 34 (1 Stat., 92; Rev. Stat., sec. 721), and there referred to "the principles derived from the common law of England" as having been established "as the laws of the different States."

In *Mary Phelps et al.* v. *S. S. City of Panama* (1 Wash. Ter., 518, 523), the Supreme Court of Washington Territory had occasion to construe the words "the laws of said Territory" as used in section 9 of the organic act establishing the Territory of Washington, to wit, the act of March 2, 1853, chap. 90, 10 Stat., pp. 175, 176. It was there contended that "laws should be taken as synonymous with statutes." This contention was rejected in an able opinion by Associate Justice Green, which is in part as follows:

> We hold that such is not the meaning of the word. The term "laws" includes not

only written expressions of the governing will, but also all other rules of property and conduct, in which the Supreme power exhibits, and according to which it exerts its governmental force.

Mr. Justice Story, in *Swift* vs. *Tyson* (16 Peters, 18), defines the "laws of a State" to be "the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws."

The laws of a commonwealth, in the language of Bouvier, are those rules and principles of conduct which the governing power in a community recognize as the rules and principles which it will enforce or sanction, and according to which it will regulate, limit or protect the conduct of its members. Tit. Law, Bouvier Dictionary. (*Mary Phelps, et al.*, v. *S. S. City of Panama*, 1 Wash. Ter. 523.)

In *Insurance Co.* v. *Wright*, 60 Vt., 515, 517, the State court decided that the word "laws," as used in the statute, prohibiting insurance companies from doing business within the State "unless responsible by the laws of the State in which * * * such * * * companies are situated * * * for the acts * * * of their agents as between said companies and the assured," etc., included the common law.

Besides joint stock companies organized "under the laws of any foreign country" are also made subject to the tax. Can it be seriously contended

that Congress intended to tax foreign joint stock companies if organized under the statutory law of a foreign country, but not if organized under its customary laws?

The conclusion to be drawn from the use of the word "every" and from the meaning of the words "joint stock company," "organized," and "laws" is that the express language of the section subjects joint stock companies, though organized under the common law of a State or Territory, to the tax.

## II.

**The Cushing Real Estate Trust and the Department Store Trust are common law joint stock companies.**

Both of the so-called trusts possess all of the characteristics and advantages essential to the existence of common law joint stock companies. Each of them is organized under an agreement and declaration of trust, defining the object for which it is organized, and providing for a capital stock represented by transferable shares; for a board of managers or trustees, who are charged with the direct management of the company's affairs and property, and whose powers, duties, and relation to the shareholders are defined at length; for a continuance of the company for a prescribed period, to wit, not less than twenty years, unless sooner terminated by a vote of a requisite number of shareholders and for the indirect control of the property and affairs of the company by the shareholders themselves. (See Exhibit "A," record in *Eliot* case, 9–15; Exhibit "A" in *Maine Baptist Missionary Convention* case, 9–13.)

These are unquestionably the characteristics of a common law joint stock company.

In *Kossakowski* v. *People*, 177 Ill., 563, 568, it is said:

> A joint stock company is an association of individuals possessing a common capital divided into shares of which each member possesses one or more. These shares represent the interest of the members and are transferable by the owners without the consent of the other members or creditors of the association.

This quotation implies that the only characteristic of a common-law joint stock company is a capital stock divided into transferable shares.

Bates, in his Law of Partnership, Vol. I, sec. 72, pp. 88, 89, defines a joint stock company as a partnership with transferable shares.

In *Tabor* v. *Breck*, 192 Mass., 355, 361, a company organized under a declaration of trust, whose capital was divided into transferable shares under the terms of the declaration, was held entitled to continued existence, despite the death of a shareholder, in accordance with the terms of the declaration.

In *Howe* v. *Morse*, 174 Mass., 491, 499, 502, a company organized under a declaration of trust and an agreement in all respects similar to the declarations of trust and agreements under consideration was recognized as valid, despite the fact that its organization closely followed that of a corporation.

Cook defines a joint-stock company as—

> An association of persons for the purpose of business, having a capital stock divided into

> shares, governed by articles of association which prescribe its objects, organization and procedure, and the rights and liabilities of the members except that the articles can not release the members from their liability as partners to the creditors of the company. (2 Cook on Corporations (6th Ed.), sec. 504, p. 1357.)

It will be observed that the declarations of trust in the case at bar are practically identical with the articles of association described by Cook. In fact, joint-stock companies are frequently, if not usually, formed under deeds of settlement and declarations of trust. See *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall., 566, 568, and *Tabor* v. *Breck*, 192 Mass., 355, 361.

The claim that these companies have no capital stock is absolutely without merit. The trustees of the Cushing Real Estate Trust issued 4,800 transferable shares, of a par value of $100 per share, in exchange for the property thereafter to be devoted to the uses of the company. The holder of a certificate or share is entitled to exactly the same sort of privileges as those possessed by the holder of the certificate of stock where the agreement and declaration of trust expressly states the company to have a capital stock and the certificates to be shares of that capital stock. Such was the case in *Howe* v. *Morse*, 174 Mass., 491, 496. The certificate of shares has a par value of $100. It is personalty, even though all the company's capital is invested in real estate, *Pittsburg Wagons Works' Estate*, 204 Pa. (St.), 432.

The trustees of the Department Store Trust issued 30,000 transferable shares, of the par value of $100

per share, in exchange for property and cash. What has been said as to the capital stock of the Cushing Real Estate Trust applies with equal force to the capital stock of the Department Store Trust.

## III.

**The Cushing Real Estate Trust and the Department Store Trust are both in fact and within the meaning of section 38 engaged in business.**

(*a*) The Cushing Real Estate Trust was organized for the purpose of buying, selling, leasing, and improving certain lands and buildings, said activities to continue for a number of years, and that too through officers, who were to receive at least 5 per cent of the gross profits by way of compensation for their services and who were to distribute the net profits and income to the shareholders. If a company organized for such a purpose is not carrying on business, it must be because it is impossible for individuals to form a company for the purpose of carrying on the real estate business.

The property of a company organized for the purpose of pursuing many activities may not improperly be said to be devoted to those activities, though from time to time some of those activities are not pursued. Such was the opinion of several of the judges in *People ex rel. Wall & H. St. T. Co.* v. *Miller*, 181 N. Y., 328, 334. The judges were there speaking of a corporation, but the purposes for which a joint-stock company is organized is defined in its declaration of trust, or articles of association, just

as fully as the purpose for which a corporation is organized is defined in its charter. In both cases we have the declared intent of the organizers themselves to devote their property to a particular use. Judge Werner there said concerning the propriety of taxing a corporation as if carrying on the business which it was organized to carry on:

> And when we appeal to the reason of the thing it seems plain that the chartered privileges of a corporation as defined in its certificate of incorporation, which is invariably framed in the language of the corporators, should be the index to its relations to the state, rather than the possibly sporadic and shifting exercise of any one or more of a larger number of the powers delegated to it.

(*b*) But even if the test be the present scope of the company's activities, the Cushing Real Estate Trust is nevertheless engaged in business.

(1) Certainly its maintenance and operation of an office building is the carrying on of a business. Substitute the words "joint stock company" for the word "corporation" and the language of Judge Vann, in *People ex rel. Wall. & H. St. R. Co.* v. *Miller*, 181 N. Y., 336, 337, applies with its full force to the transactions of the joint stock company now under consideration. His language is as follows:

> The relator carried on the business of owning, leasing and managing an office building of great value situate on Wall Street in the city of New York. It has no surplus and its entire

capital is invested in this building at the commercial center of the country. Its property is highly improved and produces a net income devoted to dividends. It manages its property through agents, as all corporations must. The management of a large modern office building, such as that of the relator, is a business as much as manufacturing. It involves the leasing of offices, the collection or rents, the operation of elevators and a heating plant, the cleaning of offices, the lighting of halls, the making of repairs and changes to suit tenants and the active supervision of an extensive business with many details. If this is not carrying on business by the active use of capital invested therein it is difficult to see what is. The statute does not exempt a corporation organized to carry on such a real estate business, and I cannot see how the court can declare it exempt without subverting the statute.

(*c*) The Department Store Trust was organized primarily for the purpose of building a department store and leasing the same in whole or part. What has been said of an office building applies with equal force to a department store, especially when rented to many tenants. And it should be observed that the renting of the department store to many tenants was within the scope of the purpose for which the company was organized. The company was, therefore, organized for the purpose of carrying on business. Though the majority of the company's property is now invested in a single building, and the building

is leased to a single tenant for many years, and the activities of the trustees or officers of the company are somewhat narrowed, nevertheless it should be observed that they collect and distribute annually $297,500 and receive 5 per cent of the gross profits for services rendered in connection with the collection and distribution of said money, and in connection with the management of said property.

The collection and distribution of rent on the grand scale which the combination of capital in the Department Store Trust has made possible (the combination itself on such a scale being made possible through a capital stock divided into transferable shares) constitutes a business. The collection and distribution of such a large sum of money necessarily involves the employment of many agents and employees. The fact that the trustees are acting for a body of shareholders, presumably numerous and constantly subject to change, increases the extent of their activities.

CONCLUSION.

The decrees of the Circuit Court from which the appeals have been taken should be affirmed.

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JANUARY, 1911.

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